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# REVOCABLE TRUSTS UNDER THE FLORIDA TRUST CODE

DONNA LITMAN\*

**SYNOPSIS:** Revocable trusts are a special type of inter vivos trust under Florida law that can be used effectively for some clients and some assets. This article explores revocable trusts under the Florida Trust Code, considering the important provisions and elements of a trust in general and of revocable trusts in particular. This article compares the provisions of Florida law and the Uniform Trust Code, as well as legislative history, and raises questions that have not been addressed by the Florida Trust Code. It considers which assets are appropriate for revocable trusts. The article also discusses important provisions for planning and drafting revocable trusts to administer and marshal assets during lifetime, to provide an alternative to guardianship, and to dispose of assets on or after death in conjunction with a will.

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A revocable trust is a special type of inter vivos trust under Florida law that provides a useful estate planning tool for some clients and some assets. The laws involving revocable trusts have evolved over time, and there are similarities between wills and revocable trusts. Generally, wills and trusts are governed by different laws, with wills being governed by the Florida Probate Code<sup>1</sup> and trusts being governed by the Florida Trust Code<sup>2</sup> (FTC)

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1. The Florida Probate Code is the short title for chapters 731–35 of the *Florida Statutes*. FLA. STAT. § 731.005 (2009). Most of the will provisions are in chapters 732 and 733 of the *Florida Statutes*. In addition, *Florida Statutes* section 731.201 contains general definitions for wills. All references to the *Florida Statutes* are to the official *Florida Statutes* (2009) unless otherwise indicated.

and, by default, the common law of trusts and principles of equity.<sup>3</sup> A revocable trust is a conceptual hybrid of a will and a trust, and there are many trust laws governing revocable trusts that parallel will laws. This article will consider revocable trusts under Florida law, with particular emphasis on private trusts under the Florida Trust Code and the similarities and differences between revocable trusts and other trusts and wills.

## I. INTRODUCTION

A revocable trust is a recognized form of an inter vivos trust that has developed over the years. Historically, revocable trusts were challenged in Florida on the basis that they were illusory or attempted testamentary dispositions and that they operated as a fraud against the surviving spouse, particularly when the settlor retained day-to-day control over the trust property and retained the right to revoke all of the provisions of the trust during the settlor's lifetime.<sup>4</sup> In 1969, the Florida Legislature preempted these arguments for written trust instruments, providing that a trust which is otherwise valid and "which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any" one or more of a number of

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2. The Florida Trust Code is the short title for chapter 736 of the *Florida Statutes*. FLA. STAT. § 736.0101. The general effective date of the Florida Trust Code was July 1, 2007, and prior to that, chapter 737 of the *Florida Statutes* governed selective aspects of trust law. See FLA. STAT. § 736.1303; see, e.g., FLA. STAT. § 736.0403(4).

3. FLA. STAT. § 736.0106. The FTC does not address all issues of trust law, and "[t]he common law of trusts and principles of equity" apply to the extent that they have not been modified by the FTC. *Id.* The common law of trusts can be found in the case law of Florida as well as the Restatement of Trusts, such as the provisions of the Second and Third Restatements. See UNIF. TRUST CODE § 106 cmt. (amended 2005). Whether Florida courts will look to the draft provisions of the Third Restatement or final provisions when adopted is unclear. The substance of *Florida Statutes* section 736.0106 and Uniform Trust Code (UTC) section 106 are the same, and the comments to that section provide:

To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts. The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation.

UNIF. TRUST CODE § 106 cmt.

4. See, e.g., *Hanson v. Denckla*, 100 So. 2d 378, 383–84 (Fla. 1956) (holding trust provisions on settlor's death to be invalid as testamentary provisions and illusory because the cumulative effect of the powers reserved by the settlor "divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death"), *rev'd on jurisdictional grounds*, 357 U.S. 235 (1958).

reasons specified in the statute, such as the retention by the settlor of the power to revoke the trust, or remove or control the trustee, or the right to withdraw property from it, or receive the income from the trust.<sup>5</sup>

In some regards, a revocable trust goes against type and has developed as an exception to the general rules of trusts and wills. To understand revocable trusts, it is important to consider the general rules of trusts and, in some cases, wills, as well as the special exceptions that apply to revocable trusts. Further, it helps to consider the differences between revocable and irrevocable inter vivos trusts, as well as to contrast revocable trusts with wills and testamentary trusts. In general, revocable trusts differ from testamentary trusts with respect to the timing of their creation, their funding, and their termination. In general, revocable trusts differ from irrevocable trusts with respect to their amendment or modification, or their revocation or termination.

A revocable trust is one of several tools that an attorney can use to effectuate a client's estate plan. The client's intent is key in determining whether to transfer property during lifetime or upon death, outright or in trust, and whether to use a will or an inter vivos or testamentary trust. For example, an inter vivos trust can be used when the owner of property wants to make an irrevocable gift of the property, but does not want the donee to have complete access to the property or control over it. In such a case, the donor could create an irrevocable trust, selecting a person, other than the donor or the donee, to serve as trustee and to hold the trust property for the benefit of the designated donee as the beneficiary of the trust. By contrast, a will can be used when the owner wants to retain complete control over property during lifetime, with the testator executing a will that does not become effective until the testator's death—a will that the testator may amend or revoke during lifetime. Further, a will can provide for outright devises, or it can provide for devises in trust, so that after the testator's death the property can be held in trust—a testamentary trust—for the benefit of one or more persons.

Ideologically, a revocable trust falls between an irrevocable outright gift and a testamentary gift in trust. A revocable trust allows a settlor to make a transfer during lifetime that can be changed or revoked.<sup>6</sup> Further, it allows the settlor to be the beneficiary of the trust during the settlor's lifetime and to serve as the trustee if the settlor desires.<sup>7</sup> It also allows the settlor to provide in the trust who will be the trustees and beneficiaries after the settlor's death.

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5. Act effective July 1, 1969, Ch. 69-192, §1, 1969 Fla. Laws 767-68 (amending FLA. STAT. ch. 689).

6. See FLA. STAT. § 736.0602(1).

7. See FLA. STAT. § 689.075(1)(f)-(g).

A revocable trust requires a transfer of ownership or declaration of trust during lifetime as would an irrevocable trust; however, it differs from an irrevocable trust because the settlor can amend or revoke the trust and recall the transfer or the declaration during lifetime. Further, a revocable trust differs from a will in this regard because the trust requires a transfer or declaration during lifetime that would not be required if the property were devised by will.<sup>8</sup>

Creating a revocable trust does not avoid the need for probate; however, it can accelerate the process and substitute a trust process for the assets that will be held in the revocable trust. Creating the revocable trust for certain assets involves the process of marshalling and transferring those assets during lifetime instead of upon death. Creating a revocable trust also can provide the settlor with an alternative to a guardianship in the event the settlor becomes incapacitated during lifetime. Further, creating a revocable trust can provide a repository to which an attorney-in-fact under a durable power of attorney can transfer assets in the event the principal becomes unable to manage his or her property.<sup>9</sup> In addition, creating a revocable trust can dispose of assets when the settlor dies by means of the trust rather than the settlor's will. Thus, the provisions of the trust may substitute for outright devises or devises with testamentary trusts.

As the use of revocable trusts has expanded in ways usually reserved for wills, Florida trust law has expanded to include provisions that parallel rules applicable to wills. Nevertheless, not all of the will provisions or default rules have parallel components in trust law. Florida did not adopt the general provision of the Uniform Trust Code (UTC) that interprets trusts and their dispositive provisions by reference to the rules that govern wills and their dispositive provisions.<sup>10</sup> Instead, the legislature chose which specific will rules to codify as trust rules, so that drafting a revocable trust may require

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8. Some might argue that the change of ownership is one of form rather than substance when the settlor is the sole trustee and the sole beneficiary during lifetime. Nevertheless, there is a difference between (1) making a transfer during lifetime that may be revoked, and (2) signing a will while retaining complete ownership until death.

9. See FLA. STAT. § 709.08(7)(b)5.

10. Compare FLA. STAT. §§ 736.1102–.1108, with UNIF. TRUST CODE § 112 (“The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.”). The UTC does not provide that the rules of construction for testamentary trusts apply to trusts, but instead provides that the rules of construction for wills apply to trusts. See UNIF. TRUST CODE § 112 cmt. See also UNIF. TRUST CODE Prefatory Note (amended 2005) (“The UPC, in Article II, Part 7, extends certain of the rules on the construction of wills to trusts and other nonprobate instruments. The Uniform Trust Code similarly extends to trusts the rules on the construction of wills.”).



more provisions than would be needed in a will because there are fewer default rules for trusts. Further, revocable trusts require inter vivos transfers or declarations as well as administration during lifetime that would not be required for wills. Revocable trusts have more potential pitfalls and less statutory default provisions and safeguards than wills and can be a trap for the unwary, especially when a lay person attempts to create a revocable trust without the benefit of competent legal counsel. Thus, it is important that an estate planning attorney be involved to help the client decide if a revocable trust is appropriate, and if so, to draft the necessary documents and facilitate the proper funding of the trust.<sup>11</sup>

When designing a revocable trust, it is important to make sure that the trust contains all of the necessary elements of a trust and complies with the formalities required by law. In some cases, the revocable trust must satisfy the same requirements for an irrevocable trust and a testamentary trust. In other cases, a revocable trust will qualify for an exception or contain special provisions that would not be allowed or required in an irrevocable trust or a will.

This article focuses on private trusts created under Florida law for individuals as opposed to charitable trusts created for charitable uses. Special rules apply to out of state trusts created by a person who is domiciled in Florida or trust instruments executed in another state.<sup>12</sup>

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11. See, e.g., Fla. Bar *re* Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 427–28 (Fla. 1992) (finding that “the assembly, drafting, execution, and funding of a living trust document constitute the practice of law” and agreeing “that a lawyer must make the determination as to the client’s need for a living trust and identify the type of living trust most appropriate for the client.”). The opinion also notes that “gathering the necessary information for the living trust does not constitute the practice of law, and nonlawyers may properly perform this activity.” *Id.* at 428; see also Fla. Bar v. Am. Senior Citizens Alliance, Inc., 689 So. 2d 255, 259 (Fla. 1997) (enjoining the unauthorized practice of law with respect to preparation of revocable trusts).

The referee found that ASCA improperly solicited customers for the purchase of legal instruments; made repeated misrepresentations; shared fees with nonlawyers; commingled advance fee payments with operating funds; restricted the exercise of independent professional judgment of corporate lawyers; made repeated advertising violations; failed or refused to communicate with clients; and disclosed confidences for profit . . . conclud[ing] that a lawyer participating in these same activities would be subject to sanction by The Florida Bar.

*Am. Senior Citizens Alliance, Inc.*, 689 So. 2d at 257. Further, “[l]ife insurance agents may properly sell life insurance that will fund a living trust and may offer advice on funding the trust from a financial standpoint.” *Fla. Bar re Advisory Opinion*, 613 So. 2d at 428.

12. FLA. STAT. § 736.0403(1). The FTC recognizes inter vivos trusts created by a settlor who is not domiciled in Florida when the trust is created if the “trust complies with the law[s] of the jurisdiction . . . [where] the settlor was domiciled” at the time of the creation of the trust. *Id.* The laws with which the settlor must comply would govern the requirements for creating the trust, including any formalities. FLA. STAT. § 736.0403(2)(b). Further, the FTC recognizes the validity of a trust instrument, executed outside of Florida, if the creation of the

The general requirements for trusts are discussed in Section II. The application of these requirements to revocable trusts and any exceptions or additional rules for revocable trusts are considered in Section III. Then the important provisions of a revocable trust are explored in Section IV.

## II. PARTIES AND REQUIRED ELEMENTS OF EXPRESS TRUSTS GENERAL RULES

Generally, an express private trust involves several parties and required elements regarding:

- 1) the settlor,
- 2) the res or trust property,
- 3) the trustee, and
- 4) the beneficiaries.<sup>13</sup>

In general: 1) the settlor is the person who creates and funds the trust for a valid purpose; 2) the res is the specific property set aside to be held in trust; 3) the trustee is the individual or corporation that holds legal title to the trust property and has the obligations and powers of ownership as well as fiduciary duties; and 4) the beneficiaries are the persons who benefit from the trust property presently, or will benefit in the future.<sup>14</sup> Florida law also allows the creation of certain trusts, such as charitable trusts, without individual beneficiaries.<sup>15</sup>

In general, a private trust can be created under Florida law when a settlor, with the capacity and intent to create a trust, creates a trust for a lawful, attainable purpose if that trust has a res, a trustee with fiduciary duties, and definite beneficiaries. The FTC has codified the general requirements to create a trust,<sup>16</sup> as well as the manner in which a trust can be created, under Florida law.<sup>17</sup> For purposes of this article, these requirements are presented under three basic categories, regarding:

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trust complies with the laws of the jurisdiction where it was executed; provided that if the settlor was domiciled in Florida at that time, and the trust is a revocable trust with testamentary aspects, the instrument must be executed with the same formalities required for a will in Florida in order for the testamentary aspects to be valid. *See id.*

13. *See generally* FLA. STAT. § 736.0103(4), (16), for general definitions of the terms, beneficiary and settlor; and *id.* § 736.0103(13), (21) for the general use of the terms, property and trustee, in the FTC.

14. *See id.*

15. *See* FLA. STAT. §§ 736.0402(1)(c)1, 736.0405(1), (2).

16. FLA. STAT. § 736.0402 (addressing the creation of the trust but not the continuing validity of the trust). Once the trust is created, what happens if one of these requirements is no longer met? *See also* FLA. STAT. §§ 736.0404–.0405 (regarding the purpose requirement).

17. *See* FLA. STAT. § 736.0401.

- 1) the settlor and the settlor's capacity, intent, and purpose;
- 2) the trust res and the formalities for creating the trust; and
- 3) the trustee and the beneficiaries and their relationship.

These three topics are discussed in general in this section regarding all trusts and then again in section III with respect to revocable trusts.

#### A. *Settlor—Capacity, Intent, and Purpose*

In order for a trust to be created, the person who creates the trust—the *settlor*—must have the *capacity* and the *intent* to create the trust and must indicate that intent.<sup>18</sup> Thus, there must be a settlor and that settlor must have the capacity to create a trust and must evidence that intent to create one. Further, the trust must be created for a valid *purpose*.<sup>19</sup>

##### 1. Settlor—Definition and Alternative Terminology

The FTC defines the term “settlor” to mean:

a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.<sup>20</sup>

Thus, the FTC uses the term “settlor” to refer to the creator of an inter vivos trust as well as the creator of a testamentary trust. When the trust is created by will, i.e., a testamentary trust, the settlor of the trust is the testator. In the case of trusts created during lifetime, i.e., inter vivos trusts, some documents and Florida statutes have or still refer to the creator of a trust as the grantor.<sup>21</sup> Further, a person who contributes property to a trust, even though he or she did not create the trust or sign the trust instrument, also is a settlor of a trust.<sup>22</sup>

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18. FLA. STAT. § 736.0402(1)(a), (b).

19. FLA. STAT. § 736.0404.

20. FLA. STAT. § 736.0103(16).

21. See, e.g., FLA. STAT. § 732.4015(2)(a), (b); however, *id* § 731.201(19) defines the term “grantor” to include the term “settlor.” Kunc v. Robinson, 469 So. 2d 874, 875 (Fla. 3d Dist. Ct. App. 1985) (discussed in *infra* note 110). The settlor or grantor also can be referred to as the trustor; however, this is rarely done. See FLA. STAT. § 731.201(19).

22. FLA. STAT. § 736.0103(16).

A trust may have more than one settlor when the trust is created, or at a later date.<sup>23</sup> For example, two individuals may create a trust together (a joint trust), or one individual may create a trust and a second individual may add property to that trust at a later date.

## 2. Capacity to Create Trust

With respect to capacity, the FTC addresses the capacity that is required to create a revocable trust, i.e., the capacity to make a will.<sup>24</sup> The FTC does not specifically address the capacity required to create an irrevocable trust or a testamentary trust—thus, this capacity is derived from the common law of trusts, including the Restatement, and principles of equity.<sup>25</sup> Further, the comments to the uniform laws are helpful.

To place the issue in context, it is important to realize that the creation of an irrevocable trust includes an irrevocable gift, while the creation of a testamentary trust requires the execution of a valid will. In order to make an irrevocable gift, the donor must have the capacity to make an inter vivos gift,<sup>26</sup> and in order to make a will, the testator must have testamentary capacity.<sup>27</sup> Thus, at a minimum, a settlor who creates an irrevocable trust must have the capacity to make an inter vivos gift, and a testator who creates a testamentary trust must have the capacity to make a will. The question, then, is whether trust law requires a settlor to have any additional capacity in order to create an irrevocable gift in trust, or a will containing a testamentary trust. Further, since the FTC adopts the capacity requirement from the UTC, the comments to the UTC are instrumental. The UTC comments rely on the authority of the Second Restatement of Trusts as well as the tentative draft of the Third Restatement of Trusts, noting:

To create a trust, a settlor must have the requisite mental capacity.  
To create a revocable or testamentary trust, the settlor must have  
the capacity to make a will. To create an irrevocable trust, the set-

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23. *See id.*; FLA. STAT. § 736.0417(1).

24. FLA. STAT. § 736.0601.

25. *See* FLA. STAT. § 736.0106; *Freeman v. Lane*, 504 So. 2d 1297, 1300 (Fla. 5th Dist. Ct. App. 1987) (regarding the capacity to revoke a trust, holding that “[i]n order to revoke a trust, one merely needs to have the capacity to understand the nature of the transaction, not necessarily an aptitude in dealing with financial matters”).

26. *See* RESTATEMENT OF PROPERTY (THIRD): WILLS AND DONATIVE TRANSFERS § 8.1(c) (2003) (to make an irrevocable gift the donor must have testamentary capacity and “must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor”); *Saliba v. James*, 196 So. 832, 835 (Fla. 1940) (discussing capacity to gift and invalidity of gifts by insane donor).

27. *See* FLA. STAT. § 732.501.



tlor must have capacity during lifetime to transfer the property free of trust.<sup>28</sup>

Thus, the drafters of the UTC did not impose any additional capacity requirements to make an irrevocable gift in trust or a devise in trust.

From a planning standpoint, a settlor who creates a trust or a testator whose will includes a trust should have a greater capacity than the capacity to make an irrevocable gift or a devise by will. The settlor or testator should understand what a trust is and should participate in the process of determining the essential provisions of the trust, including who will serve as the trustee, who will be designated as the beneficiaries, what distributions will be authorized, and whether distributions will be within the discretion of the trustee or mandatory. Thus, the settlor or testator should understand the difference between making a gift or devise outright and making a gift or devise in trust. By contrast, from a litigation standpoint, if there is an issue regarding capacity, it is arguable that the settlor merely needed the capacity to make an outright gift or devise in order to create a trust. For further discussion regarding the issue of the capacity to create a revocable trust, see section III.A.

### 3. Intent to Create Trust

In order to create a trust, the settlor must indicate an intention to create it.<sup>29</sup> This requirement is what distinguishes an express trust from an implied trust, such as a constructive trust or a resulting trust.<sup>30</sup> In general, a constructive trust is created by a court as a remedy in order to prevent a person who owns property that belongs to another from retaining ownership, while a resulting trust arises when a person transfers property, but does not intend for the transferee to have beneficial ownership of the property.<sup>31</sup> In the case of an express trust, the settlor's intent usually is evidenced by a written trust document such as a will or a trust agreement that designates a trustee and indicates that the trustee is to hold the trust property in trust and designates the beneficial interests of the trust. The FTC refers to this document as a "trust instrument," meaning "an instrument executed by a settlor that con-

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28. UNIF. TRUST CODE § 402 cmt. (amended 2005) ("See Section 601 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996; Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).").

29. FLA. STAT. § 736.0402(1)(b).

30. *See* Wadlington v. Edwards, 92 So. 2d 629, 631 (Fla. 1957); RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. a (2003).

31. *See id.*

tains terms of the trust, including any amendments to the trust.”<sup>32</sup> The FTC’s definition of the “terms of a trust” reflects the intent requirement, providing that the “[t]erms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.”<sup>33</sup> Although some trust instruments are styled or named as trust agreements, they evidence a form of ownership between the trustee and beneficiaries that is created by the settlor rather than a contractual agreement between the settlor and the trustee. Thus, the term “trust instrument” is more appropriate.

When creating an express trust, precatory language evidencing a mere wish or desire that a person hold property in trust for another should not be used.<sup>34</sup> The creation of the trust should be mandatory; however, the trustee may be granted discretion to exercise fiduciary powers regarding the administration or distribution of the trust.<sup>35</sup>

#### 4. Purpose of Trust

In order for a trust to be created, the trust must have a *lawful purpose*, whether private or charitable, that does not contravene public policy and that is *possible to achieve*, and the trust and its terms must be for the benefit of its beneficiaries.<sup>36</sup> The comments to the Uniform Trust Code provide the following additional guidance:<sup>37</sup>

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32. FLA. STAT. § 736.0103(20).

33. FLA. STAT. § 736.0103(19).

34. *See, e.g.*, *Magnant v. Peacock*, 25 So. 2d 566, 566–67 (Fla. 1946) (explaining that the testator’s “wish that the sons surviving him should ‘form a Board of Arbitration’ to accomplish a peaceable distribution of the estate and the ‘desire’ that his ‘beloved granddaughter [appellant] be provided for in such manner’ as to the executors and the members of the so-called board of arbitration should seem meet” was insufficient to create a trust). In order for a trust based on precatory language to be valid, the language that appears to be precatory must be construed as being obligatory. Some courts refer to this as a “precatory trust.” *See id.* at 567, *In re DeRoche’s Estate*, 330 So. 2d 860 (Fla. 2d Dist. Ct. App. 1976); however, in neither case was the precatory language sufficient to create a trust. Because the term “precatory trust” is a misnomer or an oxymoron, it should be avoided.

35. *See, e.g.*, FLA. STAT. §§ 736.0103(3), 736.0814 (regarding discretionary powers, such as a trustee’s power to make distributions for a beneficiary’s health, education, support, and maintenance).

36. FLA. STAT. § 736.0404. It is unclear how the latter requirement applies to a charitable trust.

37. UNIF. TRUST CODE § 404 cmt. (amended 2005) (“For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27–30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59–65 (1959).”).

A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal.<sup>38</sup>

"Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious."<sup>39</sup>

When a settlor decides to create a trust rather than make an outright transfer, the settlor has one or more reasons for creating the trust. These reasons may translate into the purposes of the trust. For example, the settlor may create a testamentary trust to provide first for the support of his or her spouse and then, after the spouse's death, to provide for the support and education of their children. Ancillary reasons may be to save taxes, such as through the use of a marital trust or a creditor shelter trust,<sup>40</sup> or to protect beneficiaries from creditors through the use of a spendthrift provision.

Usually the trust purposes are discerned from the trust distribution provisions.<sup>41</sup> Some trusts may contain provisions that further explain the settlor's intent and purpose in creating the trust and that affect the trustee's duties, such as a provision that the primary purpose of the trust is to care for the income beneficiary and that fiduciary decisions can be made that benefit the income beneficiary rather than remainder beneficiaries.<sup>42</sup> Settlers also

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38. *Id.* ("See Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959).").

39. *Id.* ("See Restatement (Third) of Trusts § 29 cmts. d–h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959).").

40. See I.R.C. §§ 1022, 2056, 2010 and *infra* notes 355–59 and accompanying text.

41. In the pre-FTC case of *Schwarzkopf v. American Heart Ass'n of Greater Miami, Inc.*, 541 So. 2d 1348 (Fla. 3d Dist. Ct. App. 1989), the court held that a trust established to distribute income to four charities for ten years, with the remainder payable to those four charities, was an active trust, and "the ownership and investment of its assets, the temporary preservation of capital, the postponement but eventual delivery of the corpus—constitute perhaps the most essential and common purposes of a trust entity." *Schwarzkopf*, 541 So. 2d at 1350.

42. See FLA. STAT. § 738.103(2) (regarding the trustee's fiduciary duty of impartiality with respect to income and principal decisions "except to the extent the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries").

may add provisions that express a purpose of the trust, such as the material purpose to aid a court when determining whether to permit a modification of the trust, or the dominant charitable purpose and the means to accomplish that purpose when a court is applying the *cy pres* doctrine.<sup>43</sup>

## B. *Trust Res and Formalities for Trust Creation*

A trust requires a res (trust property)<sup>44</sup> and the type of res affects whether a written trust instrument is required.<sup>45</sup> The FTC addresses the res requirement as well as the formalities and standard of proof for oral trusts.<sup>46</sup>

### 1. Res and Funding of Trust

The FTC addresses the res element under the “methods of creating” a trust rather than as one of the specific “requirements for creation” of a trust.<sup>47</sup> Nevertheless, a trust cannot be created without a trust res.<sup>48</sup>

A settlor who owns property can create a trust during his or her lifetime by *transferring* that property to another person as trustee or by *declaring* that he or she holds that property as trustee.<sup>49</sup> A testator can create a trust by will by *devising* that property in trust.<sup>50</sup> In addition, a settlor can create a trust by another disposition taking effect on death.<sup>51</sup> Further, a person who holds a power of appointment exercisable during lifetime or by will, may exercise the power in favor of a trustee, thereby funding an inter vivos or testamen-

43. See, e.g., FLA. STAT. § 736.04113(1)(a), (c) (regarding judicial modification of a trust when “[t]he purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill” or when “[a] material purpose of the trust no longer exists”); see FLA. STAT. § 736.0413 (regarding *cy pres* and the trust’s charitable purposes). With respect to other reasons that the trust’s purposes are important, see, for example, sections 736.0405 and 736.0409 of the *Florida Statutes*, regarding charitable and noncharitable trusts and purposes, and section 736.0108(4), regarding a trustee’s “continuing duty to administer the trust at a place appropriate to its purposes.”

44. See FLA. STAT. § 736.0401.

45. See FLA. STAT. §§ 689.05, 736.0403(2)(a).

46. See FLA. STAT. §§ 736.0401, .0403, .0407.

47. FLA. STAT. §§ 736.0401, .0402.

48. Generally inter vivos trusts are created and funded during lifetime; however, sections 732.513 and 689.075 of the *Florida Statutes* provide an exception that allows an inter vivos trust instrument to be executed in writing during lifetime and created and funded upon the settlor’s death by a pour-over devise under the settlor’s will.

49. FLA. STAT. § 736.0401(1)–(2). In the case of a declaration of trust, the statute requires the declaration to be “that the owner holds *identifiable* property as trustee.” FLA. STAT. § 736.0401(2) (emphasis added).

50. FLA. STAT. § 736.0401(1).

51. FLA. STAT. § 736.0401(1).



tary trust.<sup>52</sup> Thus, there are a number of different methods authorized by the FTC for funding a trust.

The general definition of property under the FTC is “anything that may be the subject of ownership, real or personal, legal or equitable, or any interest therein.”<sup>53</sup> Thus, there are many different types of property that can be placed in trust. Most, but not all, property may be held in trust,<sup>54</sup> but not all property that can be held in trust should be.

## 2. Written and Oral Trusts—Formalities and Burden of Proof

The FTC addresses the formalities required for the terms of a written trust instrument<sup>55</sup> and the standard of proof for establishing the terms of an oral trust under Florida law.<sup>56</sup> In addition to the formalities or standard of proof required for trusts, other laws may apply with respect to how trusts are funded. Thus, there may be additional formalities required to transfer an asset to the trustee or to declare that the owner is holding the property as trustee. For example, in order to transfer shares of stock in a publicly held corporation, the stock certificate and a duly executed assignment of the shares may need to be delivered to the corporation’s transfer agent for transfer on the stock record books.

An express trust created during lifetime that contains Florida real estate, such as “any messuages, lands, tenements, or hereditaments,” must comply with the Florida statute of frauds for land;<sup>57</sup> thus, the trust instrument must be in writing and it must be “signed by the party authorized by law to declare or

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52. FLA. STAT. § 736.0401(3).

53. FLA. STAT. § 736.0103(13).

54. See, e.g., Professional Service Corporation and Limited Liability Company Act, FLA. STAT. ch. 621. *Florida Statutes* section 621.09(1) provides:

No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than a professional corporation, a professional limited liability company, or an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated.

FLA. STAT. § 621.09(1). Although the term “property” includes an equitable interest, the provisions of one trust may prevent the beneficiary from transferring its beneficial interest in the first trust to a second trust. See FLA. STAT. § 736.0103(13); see also FLA. STAT. § 736.0502(2).

55. FLA. STAT. §§ 736.0403, 689.05.

56. FLA. STAT. § 736.0407.

57. FLA. STAT. §§ 689.05, 736.0403(2)(a). Special rules apply to Florida land trusts under *Florida Statutes* section 689.071, which are not subject to the provisions of the FTC except as provided in *Florida Statutes* section 689.071(7). FLA. STAT. § 736.0102. It is unclear why *Florida Statutes* section 689.071(9)(a) expressly states the provisions of *Florida Statutes* section 763.0705 do not apply.

create such trust or confidence.”<sup>58</sup> Further, the interest in land should be transferred to the trustee—identifying the trust by name or date—by a deed signed by the grantor/settlor or by his or her lawfully authorized attorney or agent “in the presence of two subscribing witnesses.”<sup>59</sup> A trust created by a will, i.e., a testamentary trust, requires a validly executed will.<sup>60</sup>

If a settlor domiciled in Florida creates a revocable trust and the trust has testamentary aspects—“provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to settlor’s estate”—then the trust must be executed with the formalities required for a will in Florida in order for those trust provisions to be valid when the settlor dies.<sup>61</sup> If the trust is not executed like a will, then the invalidity of the testamentary aspects will not affect the validity of the provisions of the trust that apply during the settlor’s lifetime. When the settlor dies, however, those trust provisions disposing of the trust property after the settlor’s death will not be effective. Instead, the trust will revert to the settlor’s estate when the settlor dies and the trust assets will be subject to administration and pass pursuant to the provisions of the settlor’s will or the laws of intestacy.

Generally, other trusts and provisions may be created by oral statements of the settlor, provided that “the creation of an oral trust and its terms may be established only by clear and convincing evidence.”<sup>62</sup> This standard is greater than the general civil standard of the greater weight or preponderance of the evidence, but less than the criminal standard of beyond a reasonable doubt. A settlor may orally create an irrevocable trust funded with personal property, whether tangible or intangible.<sup>63</sup> Further, a settlor may orally

58. FLA. STAT. § 689.05.

59. FLA. STAT. § 689.06. Although the deed is not required to be recorded, a notary is recommended so that the deed is recordable. FLA. STAT. § 695.03; *see also* FLA. STAT. § 689.07(1) (to determine appropriate language to identify the trust by title, date, beneficiaries, nature, or purpose so that the trustee will not be treated as the fee simple owner); *Raborn v. Menotte*, 974 So. 2d 328, 331 (Fla. 2008); Charlie Nash, *Various Courts Weigh in on Florida Homestead and Transfers of Real Estate to Trusts*, 29 ACTIONLINE 26–27 (Fla. Bar Real Prop., Prob. & Tr. L. Sec., Spring, 2008). *But see* *Flinn v. Van Devere*, 502 So. 2d 454, 455 (Fla. 3d Dist. Ct. App. 1986) (where real estate passed pursuant to the settlor’s will rather than her trust because title to the real estate was not deeded to the trustee).

60. *See* FLA. STAT. §§ 732.502, .504. A self-proof affidavit is optional. FLA. STAT. § 732.503; *see also* FLA. STAT. §§ 689.05, .06 (with respect to a testamentary trust for real estate). The will must contain a valid devise of the real estate. That devise might be a specific devise of real estate. Alternatively, it might be a residuary devise that includes real estate as part of the residuary estate.

61. FLA. STAT. § 736.0403(2)(b).

62. FLA. STAT. § 736.0407.

63. FLA. STAT. §§ 736.0403(2)(a), .0407; *see also* *Rosen v. Rosen*, 167 So. 2d 70, 72 (Fla. 3d Dist. Ct. App. 1964) (a pre-FTC case).

create a revocable trust funded with personal property if the property is to be distributed to the settlor's estate upon death.<sup>64</sup> Although oral trusts can be created during the settlor's lifetime for personalty if proven by clear and convincing evidence, they are not recommended. Instead, written trust instruments are preferred in order to provide a written record of the settlor's intent identifying the beneficiaries and delineating the distributive duties and powers of the trustees.<sup>65</sup>

Alternatively, if an inter vivos trust is executed in a jurisdiction outside of Florida, it will be valid if it complies with the formalities of that jurisdiction.<sup>66</sup> Further, if the inter vivos trust is created by a settlor who is domiciled in a jurisdiction other than Florida, the creation of the trust will be valid if its creation complies with the laws of that jurisdiction—which should include the formalities and all other requirements for creating a trust.<sup>67</sup>

Florida law also authorizes a trustee to provide a certification of trust containing information regarding the trust and the trustees and settlor, including whether the trust is revocable, or the name of any person who holds a power of revocation.<sup>68</sup> The FTC does not require any formalities for the certification, although it provides that it “may be signed or otherwise authenticated by any trustee.”<sup>69</sup>

### C. *Trustee and Beneficiaries*

In order for a trust to be created, the trustee must have *duties to perform*.<sup>70</sup> Further, in order to create a trust, the trust must have a *definite beneficiary*, i.e., a beneficiary who “can be ascertained now or in the future, subject to any applicable rule against perpetuities” or the trust must be a

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64. See FLA. STAT. §§ 736.0403(2)(a), (b), .0407.

65. See, e.g., *Rosen*, 167 So. 2d at 71–72 (a pre-FTC case requiring appellate litigation to determine that \$35,000 of life insurance proceeds paid to the insured's father were to be held in trust by him for the benefit of his grandchildren pursuant to an oral trust created by his son; however, it is unclear from the opinion as to what distributions the trustee had the discretion to make or was required to make for the benefit of the grandchildren and when the trust was to terminate).

66. FLA. STAT. § 736.0403(1).

67. See *id.*

68. FLA. STAT. § 736.1017(1).

69. FLA. STAT. § 736.1017(2). A statutory form certificate of trust—or a judicial form like a probate form—would be helpful, with a space to add additional information, regarding special powers or other provisions. See FLA. STAT. §765.203. See also *id.* §§ 709.08(4), 732.503.

70. FLA. STAT. § 736.0402(1)(d).

charitable trust<sup>71</sup> with a *charitable purpose*.<sup>72</sup> In the case of a private trust, if there is a sole trustee who is a beneficiary of the trust, that sole trustee must not be the sole beneficiary.<sup>73</sup>

### 1. Trustee with Duties to Perform

The requirement that a trustee must have *duties to perform* has two elements. The first is implicit—that the trust must have a trustee, and the general maxim that a trust will not fail for lack of a trustee should apply.<sup>74</sup> The second is expressed—that the trustee must have duties to perform.<sup>75</sup>

The FTC does not define the term “trustee” except to clarify that the FTC uses the term “trustee” to mean “the original trustee and includes any additional trustee, any successor trustee, and any cotrustee.”<sup>76</sup> Nor does the FTC address who may serve as a trustee or restrict who may serve as a trustee in the manner that personal representatives are restricted.<sup>77</sup> The comments to the UTC provide: “[a]ny natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust.”<sup>78</sup> Nevertheless, a person who lacks the capacity to exercise powers of ownership because of age or mental capacity should not be able to serve as a trustee.

Generally, corporations may serve as trustees;<sup>79</sup> and some corporations are permitted to serve as trustees, but are precluded from serving as personal

71. FLA. STAT. §§ 736.0402(1)(c), .0103(5) (“‘Charitable trust’ means a trust, or portion of a trust, created for a charitable purpose as described in s[ection] 736.0405(1).”).

72. FLA. STAT. § 736.0402(1)(c)(1); § .0103(5) (“‘Charitable trust’ means a trust, or portion of a trust, created for a charitable purpose as described in s[ection] 736.0405(1).”); § .0405. Alternatively, a trust may be created to care for an animal or for a noncharitable purpose pursuant to *Florida Statutes* sections 736.0408 and 736.0409.

73. See FLA. STAT. § 736.0402(1)(e).

74. See FLA. STAT. § 736.0106 (“The common law of trusts and principles of equity supplement this code, except to the extent modified by this code . . . .”); see also UNIF. TRUST CODE § 401 cmt. (amended 2005) (“While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary.”). See also RESTATEMENT (THIRD) OF TRUSTS § 31, RESTATEMENT (SECOND) OF TRUSTS §§ 32-33.

75. FLA. STAT. § 736.0402(1)(d).

76. FLA. STAT. § 736.0103(21).

77. See FLA. STAT. §§ 733.302–.305 (establishing who may or may not serve as a personal representative).

78. UNIF. TRUST CODE § 103 cmt. (amended 2005). “State banking statutes normally impose additional requirements before a corporation can act as trustee.” *Id.*

79. FLA. STAT. § 617.2101; see *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980) (affirming a judgment declaring *Florida Statutes* section 659.141(1) (1972) unconstitutional



representatives of estates.<sup>80</sup> Nevertheless, when a settlor chooses a corporate fiduciary, the settlor generally chooses a corporation with fiduciary expertise and generally does not choose a general business corporation with limited liability. Further, most general business corporations without fiduciary expertise choose not to serve as trustees because of the fiduciary duties and liabilities that would be imposed on them.

A Florida not-for-profit corporation may serve as a trustee of a trust when the corporation is the beneficiary of the trust.<sup>81</sup> In addition, a Florida nonprofit corporation may serve as a trustee of a trust when “any other eleemosynary institution or nonprofit corporation or fraternal, benevolent, charitable, or religious society or association” has a beneficial interest in the trust property.<sup>82</sup>

Florida regulates the conduct of trust business by certain corporate fiduciaries,<sup>83</sup> requiring “every trust company and every state or national bank or state or federal association having trust powers” to provide “satisfactory security” before “transacting any trust business” in Florida.<sup>84</sup> A trust com-

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because it “directly burdens interstate commerce in a manner that contravenes the Commerce Clause’s implicit limitation on state power”). The statute provided:

[N]o bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, [or] retain, *or own*, directly or indirectly, all, or substantially all the assets of, or control over, any *bank or* trust company having a place of business in this state where the *business of banking or* trust business or functions are conducted, or acquire, [or] retain, *or own* all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services [to trust companies or banks] in this state.

*Lewis*, 447 U.S. at 32 n.2.

80. FLA. STAT. § 660.41. This statute, entitled “Corporations; certain fiduciary functions prohibited,” provides:

All corporations are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state, as follows:

(1) As personal representative of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent is original or ancillary; however, if the personal representative of the estate of a nonresident decedent is a corporation duly authorized, qualified, and acting as such personal representative in the jurisdiction of the domicile of the decedent, it may as a foreign personal representative perform such duties and exercise such powers and privileges as are required, authorized, or permitted by [section] 734.101. . . . This section does not apply to banks or associations and trust companies incorporated under the laws of this state and having trust powers, banks or associations and trust companies resulting from an interstate merger transaction with a Florida bank pursuant to [section] 658.2953 and having trust powers, or national banking associations or federal associations authorized and qualified to exercise trust powers in Florida.

*Id.*

81. FLA. STAT. § 617.2101.

82. *Id.*

83. See FLA. STAT. § 658.12(20)–(23); see also FLA. STAT. §§ 658.16, .23(4), .25, .2953(14), .30, .33; FLA. STAT. §§ 660.27, .28, .30, .34.

84. FLA. STAT. § 660.27(1).

pany is defined as “any business organization, other than a bank or state or federal association, which is authorized by lawful authority to engage in trust business”<sup>85</sup> and “[t]rust business” means the business of acting as a fiduciary when such business is conducted by a bank, state or federal association, or a trust company, and also when conducted by any other business organization as its sole or principal business.”<sup>86</sup>

Generally, the settlor designates the trustee and the successor trustees or may authorize a trustee or a beneficiary to appoint the successors; however, if there is a vacancy, qualified beneficiaries or the court will appoint a trustee to fill a vacancy.<sup>87</sup> A vacancy may arise in the event the trustee is unable or unwilling to serve for any number of reasons, including the trustee’s incapacity, resignation, removal, or death.<sup>88</sup> Florida law also restricts which corporations may serve as a “receiver or trustee under appointment of any court in this state;”<sup>89</sup> however, it is unclear whether this restriction applies when a court fills a vacancy in an express trust.<sup>90</sup>

If the trustee designated by the settlor refuses to accept the appointment, the trust should not be invalid and a successor trustee should be appointed pursuant to the trust provisions or pursuant to the statutory provisions for filling a vacancy.<sup>91</sup> Further, if the settlor transferred assets to that trustee, the transfer should be construed as a transfer to the trustee rather than to the individual who failed to accept the trusteeship.

The legislative history for the FTC recites the general definition of a trust as “a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it”<sup>92</sup> and states that “[t]he trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary.”<sup>93</sup> Designating someone as trustee usually involves the creation of a fiduciary relationship and includes the creation of

85. FLA. STAT. § 658.12(21).

86. FLA. STAT. § 658.12(20).

87. FLA. STAT. §§ 736.0201(4)(b), .0704(2)–(3); *see* FLA. STAT. § 736.0704(4) (providing rules for filling trustee vacancies in a charitable trust).

88. FLA. STAT. § 736.0704(1).

89. FLA. STAT. § 660.41(2).

90. *See* FLA. STAT. § 736.0704(3)(c)–(4)(c) (providing when a vacancy is filled “[b]y a person appointed by the court”).

91. *See* FLA. STAT. § 736.0704(2)–(4).

92. Fla. S. Comm. on Banking & Ins., CS for SB 1170 (2006) Staff Analysis 3 (Mar. 21, 2006) [hereinafter CS for SB 1170 Staff Analysis] (quoting 55A FLA. JUR. 2D *Trusts* § 1 (2007)). This is the Restatement definition of an express trust.

93. *Id.* at 3 (quoting 55A FLA. JUR. 2D *Trusts* § 1).

beneficial interests as well; however, merely designating someone as trustee on a deed or opening a bank account in trust for an individual may be insufficient to create an express trust. The trustee's duties usually involve both administrative and distributive duties that are expressed in the trust instrument as well as provided by trust law.

The statutory requirement that the trustee must have duties in order to create a trust is a requirement of the UTC.<sup>94</sup> The comments to the UTC indicate that this requirement "recites standard doctrine that a trust is created only if the trustee has duties to perform."<sup>95</sup> Further, the UTC comments state:

Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiary's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses.<sup>96</sup>

Thus, the intent of the uniform law was to codify the general requirement that a trustee must have duties, but to allow such duties to be passive for purposes of creating a trust. This general requirement would be in addition to any other requirement that a trust containing real property have an active use in order to avoid application of the Statute of Uses.

The Florida legislative history is less clear. It states: "The trust must not be passive, meaning that the trustee must have enforceable duties to perform."<sup>97</sup> Further, it states in a footnote: "The requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust."<sup>98</sup> This analysis combines the requirement that a trustee have duties with the requirement that the sole trustee cannot be the sole beneficiary. This analysis raises the concept of an active or passive use—which arises under the Florida Statute of Uses—as well as the doctrine of merger—which involves the separation of legal and

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94. UNIF. TRUST CODE § 402(a)(4).

95. UNIF. TRUST CODE § 402(a)(4) cmt. (citing RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959)).

96. UNIF. TRUST CODE § 402 cmt. (citing RESTATEMENT (THIRD) OF TRUSTS § 6; RESTATEMENT (SECOND) OF TRUSTS §§ 67–72).

97. CS for SB 1170 Staff Analysis, *supra* note 92, at 13–14 (citing FLA. STAT. § 736.0402(1)(d); *accord* *Elvins v. Seestedt*, 193 So. 54, 57 (Fla. 1940) (quoting *Newcomb v. Masters*, 122 N.E. 85, 87 (Ill. 1919)); *Baum v. Corn*, 167 So. 2d 740, 744 (Fla. 2d Dist. Ct. App. 1964); *Watson v. St. Petersburg Bank & Trust Co.*, 146 So. 2d 383, 384–85 (Fla. 2d Dist. Ct. App. 1962)).

98. CS for SB 1170 Staff Analysis, *supra* note 92, at 14 n.124 (citing FLA. STAT. § 736.0402(1)(e)); *accord* *Wiley v. W.J. Hoggson Corp.*, 106 So. 408, 412 (Fla. 1925).

equitable title. Under the Statute of Uses, a trust for real estate will be executed when the trustee has no active duties, and by operation of law the beneficiary will become the sole owner of the trust property.<sup>99</sup> Under the merger doctrine, there must be a separation of legal and equitable title for a trust to exist or continue, so that if there is a sole trustee and that trustee is the sole beneficiary of the trust, the legal and equitable titles will merge and the beneficiary will become the outright owner.<sup>100</sup> The result can be the same in a passive real estate trust and under the merger doctrine in that the trust terminates and the beneficiary becomes the outright owner; however, a passive trust and merger generally arise under different factual situations. In the case of a passive trust, legal and equitable title may be separate—for example, the trustee and the beneficiaries may be different and there may be more than one trustee or more than one beneficiary under a passive trust.<sup>101</sup> In the case of the merger doctrine, the trustee may have active duties, but the only trustee is the only beneficiary thereby merging the legal title with the equitable title.<sup>102</sup>

The Florida legislative history implies the requirement that the trustee have enforceable, active duties in order for a trust to be created.<sup>103</sup> This may extend the requirement that a trust have an active use beyond real estate trusts; however, the end result under the FTC may differ from that under the Statute of Uses when the settlor attempts to create a passive trust. If the FTC is interpreted to require active duties for the creation of a trust and if the settlor transfers property to a trustee for the benefit of beneficiaries without imposing any active duties, the trust will not be created.<sup>104</sup> If the settlor has not created a trust, what is the effect of the transfer? If the property trans-

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99. See, e.g., FLA. STAT. § 689.09; *Clement v. Charlotte Hosp. Ass'n*, 137 So. 2d 615, 616 (Fla. 2d Dist. Ct. App. 1962).

100. See *Contella v. Contella*, 559 So. 2d 1217 (Fla. 5th Dist. Ct. App. 1990) (pre-FTC case stating: “[M]erger applies *only* when the legal and equitable interests are held by one person and are coextensive and commensurate—i.e., the legal estate and the equitable estate are the same. . . . This may occur where, by operation of law, the entire beneficial interest passes to the trustee, or the legal title passes to a sole beneficiary.”). See also *Hansen v. Bothe*, 10 So. 3d 213, 216 (Fla. 2d Dist. Ct. App. 2009) (pre-FTC facts).

An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).

UNIF. TRUST CODE § 402 cmt.

101. See, e.g., FLA. STAT. § 689.09; *Clement*, 137 So. 2d at 615 (passive trust involving individual co-trustees and sole corporate beneficiary).

102. See *supra* note 100.

103. See CS for SB 1170 Staff Analysis, *supra* note 92, at 13, 14 & n.124.

104. See FLA. STAT. § 736.0402(1)(d) (“A trust is created only if: . . . (d) The trustee has duties to perform.”).

ferred were real estate, would Florida's Statute of Uses apply to execute the use and thus transfer title to the beneficiaries?<sup>105</sup> If the property transferred were personal property, such as an intangible, would this mean that the settlor is still the owner of the property or would it mean that the transfer is valid and the beneficiaries are the owners? The answer may depend on whether the attempted trust was revocable or irrevocable; however, the FTC does not provide the answer.

Presumably, the requirement that a trustee have duties is in addition to the duties imposed on all trustees by statute and common law, such as the duty of loyalty and the duty to account, and could be satisfied even if the trustee has only one duty.<sup>106</sup> Arguably, these duties are the types of duties that would prevent the Florida Statute of Uses from terminating an active trust holding real estate.<sup>107</sup> From a planning standpoint, express trusts drafted by attorneys should not have this deficiency because the distributive and administrative provisions of the trust should result in the trustee having significant, active fiduciary duties to the beneficiaries with respect to the income and the principal of the trust. Nevertheless, it would be helpful to have more legislative or judicial clarification on this requirement.

## 2. Definite Beneficiary or Special Purpose

In order for a trust to be created, the trust must have a *definite beneficiary*, i.e., a "beneficiary [who] can be ascertained now or in the future, subject to any applicable rule against perpetuities,"<sup>108</sup> or the trust must be a charitable trust with a *charitable purpose*.<sup>109</sup> Alternatively, the settlor may

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105. See *supra* note 99 and accompanying text.

106. See, e.g., FLA. STAT. § 736.0801 (duty to administer trust); FLA. STAT. § 736.0802 (duty of loyalty); FLA. STAT. § 736.0803 (duty of impartiality); FLA. STAT. § 736.0813 (duty to inform and account). It should be noted, however, that one of a trustee's statutory duties is to administer the trust "in accordance with its terms." FLA. STAT. § 736.0801.

107. See, e.g., *Elvins v. Seestedt*, 193 So. 54, 57 (Fla. 1940) (conveyance of real property to a trustee followed by execution of a trust agreement by trustee and the beneficiaries was "a mere naked or passive trust," when the "naked trustee [was] to hold the title for the *cestui que trustent* and the only obligations assumed by the trustee were to pay over to the *cestui que trust* any proceeds coming into his hands from the property and to convey the same if and when the beneficial owners should agree upon and request such conveyances"); *Clement*, 137 So. 2d at 616 (trust of real estate created in 1945 for the active purpose of forming a corporation and constructing a hospital, did not contain "any language which impose[d] active duties and responsibilities upon the trustees after the construction of the hospital," which was completed in 1947, and was "a dry and passive trust . . . executed by the Florida Statute of Uses," *Florida Statutes* section 689.09, resulting in the beneficiary of the trust owning full title to the trust property).

108. FLA. STAT. § 736.0402(1)(c), (2).

109. FLA. STAT. § 736.0402(1)(c)(1); see FLA. STAT. § 736.0405(2).

give the trustee the power “to select a beneficiary from an indefinite class,” provided that power is exercised within a reasonable period of time.<sup>110</sup> This power merges the concept of a fiduciary power with a general power of appointment, raising questions as to what fiduciary standards apply to the exercise of such a power. If this power is used, the trust should include provisions for takers in default in the event the fiduciary does not exercise the power, and the settlor may want to specify a time period for its exercise—to avoid litigation over what constitutes a reasonable period of time.

The FTC defines the term “beneficiary” to mean “a person who has a present or future beneficial interest in a trust, vested or contingent,” and also includes a person “who holds a power of appointment over trust property in a capacity other than that of trustee.”<sup>111</sup> Further, the FTC defines the term “[i]nterests of the beneficiaries” to mean “the beneficial interests provided in the terms of the trust.”<sup>112</sup> Usually, a private trust will have more than one beneficiary, and usually it has present and future beneficiaries who may receive either mandatory or discretionary distributions of income or principal, or both. Further, the trustee may be required to accumulate rather than distribute income for some period of time. Although, the trustee may be granted significant discretion whether to make distributions and the discretion may be absolute or limited by standards, the trustee of a private trust will have a mandatory duty to distribute the trust assets when the trust terminates.<sup>113</sup> By contrast, a charitable trust may continue in perpetuity.

### 3. Separation of Legal and Equitable Interests— Co-Trustees or Beneficiaries

In order for a trust to be created, the same person must not be the sole trustee and the sole beneficiary; i.e. there must be some separation of the legal and equitable interests so that they are not identical.<sup>114</sup> Thus, the trust must either have more than one trustee or more than one beneficiary—

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110. FLA. STAT. § 736.0402(3). This reverses the result in *Kunce v. Robinson*, 469 So. 2d 874 (Fla. 3d Dist. Ct. App. 1985). The trust in *Kunce* provided:

After Grantor's death, the Trustee shall manage the trust property and shall make distributions of income and principal in accord with the provisions of this Trust for the benefit of Grantor's children and the natural born children of Grantor's children, and others as the Trustee in his discretion may deem appropriate.

*Kunce*, 469 So. 2d at 876.

111. FLA. STAT. § 736.0103(4).

112. FLA. STAT. § 736.0103(10).

113. See FLA. STAT. § 736.0817 (with respect to the trustee's duty to act expeditiously when making terminating distributions and the trustee's common law rights with respect to the final trust distribution).

114. FLA. STAT. § 736.0402(1)(e).

whether present or future beneficiaries. The sole trustee may be the sole beneficiary for a period of time, provided that there is at least one other beneficiary who may receive a trust distribution in the future.

A trust would serve no purpose if it were created with the sole trustee being the sole beneficiary; however, that situation may arise after the trust is created. For example, a settlor would not create a trust with income payable to one beneficiary for a term of years and with the principal payable to that beneficiary, or the beneficiary's estate at the expiration of the term of years, and also appoint that same beneficiary to serve as the sole trustee. If the settlor were to do that, the transfer by the settlor to the trustee would be valid; however, legal title would merge with the equitable title and the beneficiary would be the outright owner of the property free of the trust.<sup>115</sup> If the settlor wanted to create such a trust for that beneficiary, the settlor would appoint a different person as the trustee or would appoint the beneficiary and another person as co-trustees. Instead, the merger doctrine may apply after the creation of the trust in the event that the only trustee also becomes the only beneficiary.<sup>116</sup> For example, the settlor could create a trust with the settlor's children as the trustees, with income payable to the settlor's spouse for life and with the remainder distributable to the settlor's surviving children. If the spouse and all of the children except one should die, then that surviving child would be the sole trustee and the sole beneficiary. In such case, the trust would terminate under the merger doctrine as well as under the terms of the trust, and the question would be whether this occurs by operation of law immediately upon the death of the spouse, or occurs by reason of the terms of the trust, with the trustee having a reasonable period of time to wind up the trust and distribute the trust assets.

Although the settlor may want some of the beneficiaries to be trustees, the settlor usually does not want the only trustee to be the only present beneficiary of a trust. For example, in creating a marital trust,<sup>117</sup> the testator might designate the surviving spouse to serve as a co-trustee of the marital trust but would not want the spouse to serve as the only trustee for a number of reasons, including income tax reasons.<sup>118</sup> One exception is that when a settlor creates a revocable trust, the settlor may choose to be the sole trustee and the sole beneficiary, during the settlor's lifetime.

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115. See *supra* note 100.

116. See *id.*

117. A marital trust could be created to qualify for the marital deduction for a year in which the federal estate tax applies or to qualify for the spousal property basis increase if there is no federal estate tax. See I.R.C. §§ 2056, 1022(c).

118. See, e.g., I.R.C. § 678.

### III. PARTIES AND REQUIREMENTS FOR REVOCABLE TRUSTS

The general statutory requirements for an express trust apply to revocable trusts; however, because of the special nature of a revocable trust, there are some exceptions and additional rules for revocable trusts. A revocable trust, as defined by the FTC, is a trust that is “revocable by the settlor without the consent of the trustee or a person holding an adverse interest.”<sup>119</sup>

The exceptions and rules for revocable trusts are particularly important because the lines between the parties can blur in a revocable trust, such as when the settlor serves as the trustee or when the settlor is the only beneficiary during the settlor’s lifetime. In the case of a revocable trust, fiduciary duties under trust law and under the provisions of a revocable trust only apply to the settlor during his or her lifetime.<sup>120</sup> A spendthrift provision in a revocable trust generally will not protect the settlor’s interest in a revocable trust from the reach of the settlor’s creditors during the settlor’s lifetime but will protect beneficial interests after the settlor’s death.<sup>121</sup> Further, certain aspects of revocable trusts may require additional formalities.<sup>122</sup>

Section 689.075 of the *Florida Statutes* provides additional exceptions when a trust, that is otherwise valid, will not be invalid because the settlor or another person, or both, possess any of the following powers:

- (a) “the power to revoke, amend, alter, or modify the trust in whole or in part;”
- (b) “the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;”
- (c) “the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times;”
- (d) “the power to remove the trustee or trustees and appoint a successor trustee or trustees;” and
- (e) “the power to control the trustee or trustees in the administration of the trust.”<sup>123</sup>

In addition, if a trust is otherwise valid, it will not be held invalid because:

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119. FLA. STAT. § 736.0103(15).

120. *See, e.g.*, FLA. STAT. §§ 736.0603(1), .0813(4).

121. *Compare* FLA. STAT. § 736.0502(1), (3) (spendthrift provisions), *with* FLA. STAT. § 736.0505(1)(a) (creditors’ claims against settlor).

122. *See, e.g.*, FLA. STAT. § 736.0403(2)(b) (formalities for testamentary aspects).

123. FLA. STAT. § 689.075(1)(a)–(e).



(f) “the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof;” or

(g) “the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee.”<sup>124</sup>

Section III discusses the requirements for creating a revocable trust, including the application of these general rules and the special exceptions under the FTC and the *Florida Statutes*, including section 689.075.

#### A. *Settlor—Capacity, Intent, and Purpose for Revocable Trusts*

In order to create a revocable trust during the settlor’s lifetime, the settlor must have the capacity and intent to create the trust and must indicate that intention.<sup>125</sup> Further, the trust must have a valid purpose.<sup>126</sup> These are the same requirements that apply for all trusts; however, the FTC specifically addresses the capacity requirement for revocable trusts. The FTC provides that the capacity that the settlor must have to create “a revocable trust, is the same as that required to make a will.”<sup>127</sup> In addition, in order for the settlor to “amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee,” the settlor needs the same capacity as “that required to make a will.”<sup>128</sup>

##### 1. Capacity to Create Revocable Trust

Florida adopted the same test that is recommended by the UTC, and the comments indicate that the UTC included “a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning.”<sup>129</sup> Part of this uncertainty was because the Second Restatement of Trusts from 1959 provided “A person has capacity to create a trust by transferring property inter vivos in trust to the extent that he has capacity to transfer the property inter vivos free of trust.”<sup>130</sup> The comment states:

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124. FLA. STAT. § 689.075(1)(f), (g).

125. FLA. STAT. §§ 736.0402(1)(a), (b), .0601.

126. FLA. STAT. § 736.0404.

127. FLA. STAT. § 736.0601.

128. *Id.*

129. UNIF. TRUST CODE § 601 cmt. (“No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust.”). See FLA. STAT. § 736.0601.

130. RESTATEMENT (SECOND) OF TRUSTS § 19 (1959).

If, but only if, the owner of property has capacity to transfer the property *inter vivos* to another person to be held by him for his own benefit, he has capacity to transfer it *inter vivos* to be held by the transferee in trust. The rules as to capacity to transfer property *inter vivos* are not peculiar to the law of Trusts and a statement of the rules is not within the scope of the Restatement of this Subject.<sup>131</sup>

The FTC and the UTC chose to align revocable trusts with wills rather than irrevocable trusts for purposes of the capacity required to create revocable trusts, instead of creating a separate capacity in between the capacity to create a will and the higher capacity to create an irrevocable trust. This is true even though the creation of a revocable trust requires more than the execution of a will.<sup>132</sup> In order to create a revocable trust, the settlor must fund it during lifetime by transfer, declaration, or designation; whereas, a testator when making a will does not need to transfer any assets or create any beneficial interests during lifetime. Further, a settlor can create a revocable trust that grants the trustee the power to make irrevocable gifts during the settlor's lifetime or incapacity.<sup>133</sup>

The reason given in the uniform act for choosing the capacity to make a will is:

The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pour-over will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply.<sup>134</sup>

In order to make a will under Florida law, the testator must be of "sound mind" and have attained the age of eighteen or be an emancipated minor.<sup>135</sup>

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131. *Id.* at cmt. a.

132. *See* FLA. STAT. § 736.0401.

133. A settlor may grant the trustee the discretion to make distributions to other beneficiaries, such as the settlor's children, during the settlor's lifetime. *See also* I.R.C. § 2035(e).

134. UNIF. TRUST CODE § 601 cmt. (amended 2005).

135. FLA. STAT. § 732.501. Further, funding a trust during lifetime requires the application of non-trust law, such as corporate and securities law when transferring stocks, real estate law when transferring real estate, and those laws may require additional capacity to effectuate

Thus, in order for a settlor to create a revocable trust, the settlor must be an adult or an emancipated minor, who is of sound mind. Generally, for wills:

[b]y “sound mind” is meant the ability of the testator to “to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator’s relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed.”<sup>136</sup>

This definition must be adapted to a revocable trust. One possible way to adapt the definition would be to require the settlor to mentally understand in a general way the nature and extent of the property that the settlor could dispose of by will or trust and the settlor’s relation to those who would naturally claim a substantial benefit from his or her estate by will or intestacy, as well as a general understanding of the practical effect of the will—or intestacy—and the trust as executed.<sup>137</sup>

In most cases, when a settlor creates a revocable trust, he or she is also executing a pourover will—a will that devises the residuary estate to the

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those transfers; unless section 736.0601 of the *Florida Statutes* is construed as superseding any other capacity requirement for transfers of property in trust.

136. *In re Wilmott’s Estate*, 66 So. 2d 465, 467 (Fla. 1953) (quoting *Newman v. Smith*, 82 So. 236, 241 (Fla. 1918)). In deciding the test for capacity, the Supreme Court of Florida also quoted a New York opinion that used an expanded definition of testamentary capacity—“sound mind and memory”:

We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.

*Newman*, 82 So. at 248 (quoting *Delafield v. Parish*, 25 N.Y. 9, 29 (1862)); *see also* *Hamilton v. Morgan*, 112 So. 80, 82 (Fla. 1927) stating:

If the testator comprehends perfectly the condition of his property, his relation to those who would, should, or might have been the objects of his bounty, the scope and effect of his will, which comprehends sufficient active memory to collect voluntarily in his mind the complexities of the business to be transacted and keep them in mind long enough to perceive their relation to each other, and to form a rational judgment in relation to them, he is said to have mental capacity.

*Hamilton*, 112 So. at 82.

137. *See In re Wilmott’s Estate*, 66 So. 2d at 467 (quoting *Newman*, 82 So. at 241). *See also* RESTATEMENT OF PROPERTY (THIRD): WILLS AND DONATIVE TRANSFERS § 8.1(b) (2003).

trustees of the revocable trust.<sup>138</sup> In order for the testator to have the requisite capacity to execute the pourover will, the testator must have a general understanding that his or her estate will be distributed pursuant to the provisions of his or her will and revocable trust—which would include the testamentary aspects of the revocable trust. Thus, the capacity required to create a revocable trust should be the same as the capacity to execute a will that contains a devise that pours over to that revocable trust, and the testator should have a general understanding of who will receive the estate and trust assets when the settlor dies. In some cases, the beneficiaries of the settlor's will are different from the beneficiaries of the settlor's revocable trust; so that in order for the settlor to have the capacity to create the revocable trust, the settlor should understand in a general way who will receive the trust assets when the settlor dies. In other cases, the settlor may add property to an existing revocable trust that the settlor created, or may withdraw property from it without revoking or changing his or her will. In such cases, being of sound mind should include the settlor having a general understanding of the effect on such property.

When a settlor creates a revocable trust and acts as the sole trustee and the sole beneficiary during his or her lifetime, the effect of the trust is the same as a will—no one else really benefits from the trust until the settlor's death. Thus, it is not as important that the settlor have a capacity greater than testamentary capacity.<sup>139</sup> If however, the settlor is creating the trust so that a third party trustee will be responsible for managing the assets and making distributions for the benefit of the settlor or others, then it is important that the settlor understand the provisions of the trust during his or her lifetime, including whether the trustee can make irrevocable gifts from the trust. Further, if the settlor includes provisions in the event of the settlor's incapacity as an alternative to guardianship, regarding who will serve as trustee and the trustee's administrative and distributive powers during the settlor's lifetime, it is important that the settlor understand the choices he or she is making. This would require a capacity greater than testamentary capacity. If the settlor lacks this additional capacity, the revocable trust would not be invalid; however, it might require the appointment of a guardian to review the actions of the trustee and determine whether to exercise the settlor's

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138. See FLA. STAT. § 732.513. See also *supra* text accompanying note 134. A pourover will is a misnomer because the will may contain other devises and provisions in addition to the residuary, pourover devise. Alternatively, a will could contain a specific, demonstrative, or general devise that pours over to a revocable trust, with a residuary devise to another devisee.

139. This raises a question as to the capacity required to serve as trustee: What capacity does one need to serve as trustee?

powers of amendment for the benefit of the settlor. If the settlor becomes incapacitated, and a guardian is appointed for the settlor's property, the guardian may petition to amend the trust for the settlor's benefit during the settlor's lifetime in the event the guardian believes that the existing provisions are not in the best interest of the settlor; and the settlor's capacity at the time of the creation of the trust may factor into whether a court will authorize the amendment.<sup>140</sup>

It is clear that the settlor should have the capacity to make a will in order for the testamentary aspects of the trust to be valid, because these provisions substitute for provisions in a will. On the other hand, it is arguable that to protect settlors, the legislature should require a higher standard of capacity in order for the settlor to be able to transfer assets to a revocable trust during the settlor's lifetime, and for the provisions of the trust to be effective during the settlor's lifetime.

## 2. Intent to Create Revocable Trust

In order to create a revocable trust, the settlor must have the intent to create the trust and must indicate that intent.<sup>141</sup> This requirement is the same for all types of trusts, with no special requirements for revocable trusts. In most cases, the intent to create a revocable trust will be expressed in a written trust instrument.

## 3. Purpose of Revocable Trust

In order to create a revocable trust, the trust must have a lawful purpose that is possible to achieve and not contrary to public policy.<sup>142</sup> This lawful purpose may be a private or a charitable purpose.<sup>143</sup> Most revocable trusts are private trusts, benefitting the settlor exclusively during the settlor's

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140. See FLA. STAT. § 744.441(19) (granting the power to "[c]reate or amend revocable trusts" but not mentioning revocation); see also FLA. STAT. § 744.441(2) (granting a guardian the power to exercise "any powers as trustee . . . that the ward might have lawfully exercised . . . if not incapacitated, if the best interest of the ward requires such . . . exercise"). However, it is difficult to understand how an incapacitated ward could have the power to act as trustee or how the ward's guardian would be able to exercise the ward's power as trustee. Generally, the trust would provide for a different trustee in the event the settlor becomes incapacitated. See also FLA. STAT. § 736.0704(1)(f) (regarding the vacancy that occurs when a "trustee is adjudicated to be incapacitated"). See also text accompanying *infra* notes 311–14 regarding these powers.

141. See FLA. STAT. § 736.0402(1)(b).

142. FLA. STAT. § 736.0404; see, e.g., FLA. STAT. § 736.0409(1); see also RESTATEMENT (THIRD) OF TRUSTS § 27 (2003).

143. See FLA. STAT. § 736.0405(1).

lifetime and then providing for other individuals after the settlor's death; however, the settlor may also provide for distributions to charitable beneficiaries or for charitable purposes. In some cases, the trust instrument will state its purpose; however, the purposes of a revocable trust may be discerned from the administrative and distribution provisions of the trust.<sup>144</sup> A revocable trust can be created for a number of different purposes. For example, 1) it may be created to provide for distribution of trust assets upon the settlor's death as a substitute for a devise by will, with potentially more privacy than may be provided by a will; 2) it may be created to provide for fiduciary management of the settlor's assets when the settlor designates a trustee other than the settlor to serve for this purpose; 3) it may be created to provide for the settlor in the event of the settlor's incapacity and provide a viable alternative to a guardian, appointing a trustee to administer the trust assets and distribute them for the benefit of the settlor; or 4) it may be used in lieu of a testamentary trust, with the trust continuing after the settlor's death. Thus, a revocable trust may be created for asset management during lifetime or incapacity and as a substitute for a devise by will, providing an alternative to a guardianship and providing for trust administration rather than probate of assets. It also may be created to hold non-Florida real property and avoid the need for an ancillary administration in another state or jurisdiction.

In order to create a trust, the "trust and its terms must be for the benefit of its beneficiaries."<sup>145</sup> Although this requirement applies on its face to all trusts, and thus to revocable trusts, it should be qualified by the fact the terms of the trust are subject to the settlor's right to amend or revoke the trust and any other rights retained by the settlor.<sup>146</sup> Further, it should be qualified by the law that during the settlor's lifetime, the trustee of a revocable trust only owes duties to the settlor.<sup>147</sup>

#### B. *Trust Res and Formalities for Creation of Revocable Trust*

The general rule that a trust requires a res—trust property—applies to revocable trusts with certain liberal exceptions.<sup>148</sup> The formalities required

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144. See, e.g., *Schwarzkopf v. Am. Heart Ass'n of Greater Miami, Inc.*, 541 So. 2d 1348, 1349–50 (Fla. 3d Dist. Ct. App. 1989).

145. FLA. STAT. § 736.0404.

146. See, e.g., FLA. STAT. § 689.075(1)(a), (f).

147. FLA. STAT. § 736.0603(1).

148. See FLA. STAT. §§ 736.0401, 689.075(1), 732.513(1)(c).

for the creation and implementation of a revocable trust depend on the type of property being held in trust and the distributive provisions of the trust.<sup>149</sup>

### 1. Res and Funding of Revocable Trusts

The creation of a revocable trust requires a res.<sup>150</sup> That res may consist of real property, tangible personal property, or intangible personal property;<sup>151</sup> and the res may include the right to receive life insurance proceeds payable on the settlor's death.<sup>152</sup> If a revocable trust has a res, the validity of the trust will not be affected by the fact that the settlor has "the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times."<sup>153</sup>

Funding a revocable trust may be accomplished by a transfer, declaration, or designation.<sup>154</sup> The settlor may transfer the property to the trustee of the revocable trust during the settlor's lifetime;<sup>155</sup> or if the settlor is the sole trustee of the revocable trust, the settlor may declare that he or she holds the property in trust.<sup>156</sup> Alternatively, the settlor may fund a revocable trust by exercising a power of appointment during the settlor's lifetime.<sup>157</sup> In addition, the settlor may fund a revocable trust by designating the trustee as a beneficiary to receive life insurance proceeds or other assets or benefits payable on the death of the settlor.<sup>158</sup> Further, a statutory exception allows a testator to fund a revocable trust instrument at death by devising property to the trustees if the trust instrument is in writing and was in existence when the will was executed, or was subscribed concurrently with the execution of the will.<sup>159</sup> A settlor also may fund a revocable trust by exercising a power of appointment by will.<sup>160</sup>

Florida adopted the rules from the UTC regarding the manner by which a trust can be created.<sup>161</sup> The comments to the UTC acknowledge that

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149. See FLA. STAT. §§ 736.0403(2), 736.0407.

150. See FLA. STAT. § 736.0401.

151. FLA. STAT. § 689.075(1).

152. FLA. STAT. § 733.808(1).

153. FLA. STAT. § 689.075(1)(c).

154. FLA. STAT. § 736.0401.

155. FLA. STAT. § 736.0401(1).

156. FLA. STAT. § 736.0401(2).

157. FLA. STAT. § 736.0401(3).

158. FLA. STAT. §§ 689.075(1), 733.808(1).

159. FLA. STAT. § 732.513(1).

160. FLA. STAT. § 736.0401(3).

161. See CS for SB 1170 Staff Analysis, *supra* note 92, at 1. Compare FLA. STAT. § 736.0401 with UNIF. TRUST. CODE § 401.

“[u]nder the methods specified for creating a trust in this section, a trust is not created until it receives property.”<sup>162</sup> Further the comments state:

A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. . . . Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust.<sup>163</sup>

When the settlor wants to serve as the sole trustee, the settlor does not need to transfer the title to the settlor as trustee because the settlor already owns the property. Instead, the settlor can declare that he or she is serving as trustee,<sup>164</sup> and this declaration can result in the settlor transferring the beneficial interests in the property, retaining only the legal title. In the case of a revocable trust where the settlor is the sole beneficiary and trustee during the settlor's lifetime, this results in the settlor transferring only the future equitable interests, and that transfer is subject to the settlor's right of revocation. Although a settlor who is the trustee may create the trust by declaration rather than transfer, it is better to change the title to the name of the settlor as trustee in order to avoid a dispute when the settlor dies as to whether these assets are part of the probate estate or are trust assets.<sup>165</sup> The comments to the UTC note:

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create

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162. UNIF. TRUST CODE § 401 cmt. (amended 2005) (“For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40–41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74–86 (1959).”).

163. UNIF. TRUST CODE § 401 cmt.. (internal citation omitted) (“See Unif. Testamentary Additions to Trusts Act Section 1 (1991), *codified at* Uniform Probate Code Section 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).”).

164. FLA. STAT. § 736.0401(2).

165. See, e.g., *In re Estate of Pearce*, 481 So. 2d 69, 70–71 (Fla. 4th Dist. Ct. App. 1985) (where settlor declared herself trustee of stock; however, title to the stock was not transferred to her name as trustee).



the trust. A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and, for this reason, is not recommended.<sup>166</sup>

Not all assets may be transferred to a trust, and not all assets that can be held in trust should be held in a revocable trust. Some laws or agreements prohibit certain types of assets from being held in trust. For example, interests in professional service corporations may only be owned by licensed professionals and may not be held in trust.<sup>167</sup> Further, the owners of interests in other entities, such as corporations, limited liability companies, or partnerships, may have entered into agreements that restrict the ownership or transfer of the interests, prohibiting them from being held in trust. Alternatively, they may have entered into agreements that allow a transfer on an interest only with the prior consent of the other owners, and the other owners may be unwilling to consent to a transfer in trust.

Some assets may have special exemptions, benefits, restrictions, or uses that make it inadvisable to transfer them to a trust because it may limit the settlor's planning opportunities or it may jeopardize the exemption or complicate the process of claiming it. Assets that require special consideration include homestead real property and tangible personal property, including exempt personal property.<sup>168</sup> These special types of property are discussed in Section III.B.2. The settlor also may want to retain certain assets in his or her individual name for psychological reasons. The settlor might not want to be reminded of the settlor's mortality or potential for incapacity on a frequent basis, and this might occur if the settlor is the trustee and holds assets in trust, such as a bank account that is used frequently.

A settlor may choose to keep funds in a bank account in the settlor's name so that the settlor has ready access to those funds without making any request of the trustee, or if the settlor is the trustee, without complying with any trust formalities. In addition, the settlor may choose to own his or her car, furniture, jewelry, and other tangible personal property in his or her sole name, outside of the trust. The settlor also may choose to own his or her home outright, or if married, in a tenancy by the entirety. Further, the settlor

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166. UNIF. TRUST CODE § 401 cmt. (internal citation omitted) (amended 2005) ("See, e.g., *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement (Third) of Trusts Section 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 17 cmt. a (1959).").

167. See FLA. STAT. § 621.09(1) (quoted in *supra* note 54).

168. See FLA. CONST. art. X, § 4(a); FLA. STAT. § 732.402.

may choose to own life insurance policies in his or her own name and designate the trustee as the beneficiary of the policy, if the trust is to continue after the settlor's death. In addition, the settlor may choose to own his or her business outright and not transfer business interests to a revocable trust, especially when the settlor actively and materially participates in that business. This then leaves the settlor with investment assets, usually intangibles (e.g., stocks, bonds, certificates of deposit, treasury instruments), that the settlor may choose to transfer into a revocable trust.

## 2. Special Types of Property

### a. *Homestead Real Property*

Homestead ownership in Florida has many advantages and certain restrictions. It is questionable whether transferring homestead property to the trustee of a revocable trust creates any additional advantages, and in some cases, it may create problems.

A homestead that is owned by a natural person consisting of real estate that does not exceed certain acreage requirements is exempt from the owner's creditors' claims because liens may not attach to the homestead, and the property may not be subject to forced sale by judicial process.<sup>169</sup> Notwithstanding, the homestead can be subject to forced sale and liens, such as mechanics liens, that can attach with respect to: 1) property taxes and assessments on the homestead; 2) "obligations contracted for the purchase, improvement, or repair thereof"; 3) "obligations contracted for house, field, or other labor performed on the realty;" and 4) federal taxes.<sup>170</sup> Further, a homestead may be subject to foreclosure in the event of a default when there is a validly executed mortgage—joined by the owner's spouse if married.<sup>171</sup>

The Florida Constitution does not provide any dollar limitation on the exemption for homestead realty; however, Congress has attempted to impose a dollar limitation on the Florida constitutional exemption in bankruptcy when the debtor has not satisfied a sufficient period of residency in Florida prior to acquiring the interest in the homestead.<sup>172</sup> The Florida Constitution

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169. FLA. CONST. art. X, § 4.

170. FLA. CONST. art. X, § 4(a). See *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963); *United States v. Rodgers*, 461 U.S. 677 (1983) (regarding federal liens against Texas homestead).

171. See FLA. CONST. art. X, § 4(c).

172. See 11 U.S.C. § 522(p)(1) (2006); see also *In re Landahl*, 338 B.R. 920 (Bankr. M.D. Fla. 2006). There is, however, a constitutional objection to this provision of the Bankruptcy Code.

does limit the exemption by acreage.<sup>173</sup> The exemption is limited to a maximum of one-half an acre within a municipality and a maximum of 160 contiguous acres outside a municipality.<sup>174</sup> While an urban homestead is "limited to 'the residence of the owner or the owner's family,'" a rural homestead may include improvements used in a business, such as a working farm.<sup>175</sup>

The Florida Constitution provides restrictions on the owner's right to alienate or devise homestead property.<sup>176</sup> A married owner may not mortgage, sell, give, or otherwise alienate the homestead without the joinder of the spouse.<sup>177</sup> An owner may not devise the homestead if survived by a minor child;<sup>178</sup> and if the owner is married, the surviving spouse will receive a life estate in the home and the owner's descendants will receive a vested remainder, per stirpes.<sup>179</sup> If the owner is not married but is survived by a minor child, all of the owner's descendants will receive the homestead, per stirpes.<sup>180</sup> A married owner who is not survived by a minor child may devise all of the owner's interest in the homestead to his or her surviving spouse by the use of a specific or residuary devise.<sup>181</sup> When the owner dies, if the homestead is devised or passes by law to the deceased owner's spouse or heirs, i.e. any person within the class of persons who could inherit under

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173. See FLA. CONST. art. X, § 4(a)(1).

174. *Id.*

175. *Davis v. Davis*, 864 So. 2d 458, 458, 460 (Fla. 1st Dist. Ct. App. 2003) (the decedent's homestead included acreage, outside a municipality, that did not exceed 160 acres and that included his residence and contiguous land on which the decedent operated a mobile home park for rental income).

176. See FLA. CONST. art. X, § 4(c).

177. *Id.*

178. *Id.*

179. FLA. STAT. § 732.401(1). Proposed legislation would allow the spouse to elect to receive an undivided one-half interest in the homestead, as a tenant in common with the lineal descendants, in lieu of the life estate. See Fla. SB 1544 (2010) (identical to HB 1237).

180. FLA. STAT. §§ 732.401(1), .103(1).

181. FLA. CONST. art. X, § 4(c); see *In re Estate of Finch*, 401 So. 2d 1308, 1309 (Fla. 1981) (holding a married testator with two adult daughters could devise the homestead to his spouse or allow his spouse to receive a life estate with the testator's daughters receiving the vested remainder, but could not devise a life estate to his spouse and the vested remainder to only one of the daughters); see also *Estate of Murphy*, 340 So. 2d 107, 108–09 (Fla. 1976) (holding a testator survived by a spouse and an adult son could devise his homestead, acquired after the execution of his will, to his spouse by a specific or a residuary devise). In *Murphy*, the court stated: "Unquestionably a specific devise is to be preferred, but in the absence of a specific devise, we conclude that the general language of a residuary clause is a sufficiently precise indicator of testamentary intent." *Murphy*, 340 So. 2d at 109.

intestacy,<sup>182</sup> then the exemption—from the deceased owner’s creditors—inures to those persons.<sup>183</sup> Under such circumstances, the homestead is considered a “protected homestead” for purposes of the Florida Probate Code.<sup>184</sup> By contrast, if the homestead is lawfully devised to a friend or other person who could not inherit from the decedent under any circumstances, then the homestead is not protected from the decedent’s creditors because the exemption does not inure to the benefit of the devisee.<sup>185</sup>

When the homestead is a protected homestead, the personal representative does not take possession or control of it,<sup>186</sup> and the protected homestead is exempt from the apportionment of any estate taxes.<sup>187</sup> The probate court has jurisdiction to determine if property is a protected homestead, and there are procedures and forms to petition the court for this determination.<sup>188</sup> Further, the probate court has jurisdiction to apportion the tax on the homestead.<sup>189</sup> When a person owns property outright, the probate process is available to establish homestead status so that the benefit of the exemption can inure to the surviving spouse and heirs.<sup>190</sup> Thus, although protected homestead is not subject to probate, it can benefit from the process. By contrast, when ownership of the homestead is transferred to the trustee of a revocable trust, an action would be required in the general division of the circuit court rather than in the probate division to determine the homestead status of the property when the settlor dies.<sup>191</sup> Further, the general rules of

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182. *Snyder v. Davis*, 699 So. 2d 999, 1000, 1003 (Fla. 1997) (applying the “class definition” rather than the “entitlement definition,” holding that: “the word ‘heirs,’ when determining entitlement to the homestead protections against creditors, is not limited to only the person or persons who would actually take the homestead by law in intestacy on the death of the decedent,” and that instead, “the constitution must be construed to mean that a testator, when drafting a will prior to death, may devise the homestead (if there is no surviving spouse or minor children) to any of that class of persons categorized in section 732.103 (the intestacy statute)”).

183. FLA. CONST. art. X, § 4(b); *Snyder*, 699 So. 2d at 1000.

184. FLA. STAT. § 731.201(33).

185. *See* FLA. CONST. art. X, § 4(b). The exemption would inure to the decedent’s heirs; however, they would not benefit from the exemption because they did not also receive the property.

186. FLA. STAT. § 733.607(1).

187. FLA. STAT. § 733.817(2); *see also* FLA. STAT. § 733.817(5)(c). If the owner dies in a year when there is no federal or Florida estate tax, the issue of tax apportionment is moot.

188. *See* FLA. PROB. R. 5.405. *See generally*, FLA. CONST. art. V, §§ 5, 7. *See also In re Noble’s Estate*, 73 So. 2d 873 (Fla. 1954).

189. FLA. STAT. § 733.817(7)(b).

190. *See* FLA. PROB. R. 5.405(c).

191. The rules of the Florida Probate Court regarding protected homestead apply to “homestead real property owned by the decedent.” FLA. PROB. R. 5.405(a).

civil procedure would apply rather than the probate rules and probate forms.<sup>192</sup>

A homestead may be owned by a husband and wife as tenants by the entirety and qualify for the homestead exemption from creditors during their lifetimes in addition to the exemption provided by entirety ownership. Further, when the first spouse dies, the surviving spouse will be the surviving sole owner, even if the deceased spouse had a minor child. Many married couples choose entirety ownership for homestead. Entirety ownership allows the spouse to avoid the effect of the prohibition against devise when there is a minor child.<sup>193</sup> By contrast, if one spouse owned the homestead and transferred it to a revocable trust, the surviving spouse would not be entitled to the entire homestead if the settlor died survived by a minor child. Further, if both spouses owned the homestead and transferred it to a joint revocable trust, they would no longer own the homestead by the entirety even if they were both settlors and trustees of the trust and even if they were the only beneficiaries during their lifetime.

If the settlor transfers his or her homestead to a revocable trust, it makes it more complicated to identify the settlor's interests in the homestead and to determine whether those interests qualify for the exemption from the settlor's creditors during lifetime. To the extent the settlor has created a remainder interest in the homestead, even though the interest is contingent on the settlor's death and subject to revocation by the settlor, that equitable future interest is not the settlor's homestead;<sup>194</sup> however, it can be protected from creditors of the remainder beneficiaries by a spendthrift provision.<sup>195</sup> To the extent the settlor retains rights and interests as the settlor or the beneficiary of the trust and the home is the residence of the settlor or the settlor's family, those equitable interests should qualify for the homestead creditor exemption and the Florida courts and most bankruptcy courts agree.<sup>196</sup> One bankruptcy

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192. FLA. STAT. § 736.0201(1).

193. See FLA. CONST. art. X, § 4(c); FLA. STAT. § 732.401(2).

194. See *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727, 729 (1969) ("By great weight of precedent a claim of homestead may not attach to either vested or contingent future estates or interests in land, because a remainder expectant upon cessation of a preceding estate creates no present right to possession . . . ." (quoting *Anemaet v. Martin-Senour Co.*, 114 So. 2d 23, 27 (Fla. 2d Dist. Ct. App. 1959))). Generally, the remainder interests in a revocable trust are disregarded for purposes of determining if the homestead is exempt from the settlor's creditors during the settlor's lifetime or if the settlor is subject to the constitutional restriction on devise upon death. See, e.g., FLA. STAT. § 732.401(1), (2); *Johns v. Bowden*, 66 So. 155, 159 (Fla. 1914); *Engelke v. Estate of Engelke*, 921 So. 2d 693, 696–97 (Fla. 4th Dist. Ct. App. 2006); *In re Estate of Johnson*, 397 So. 2d 970, 973 (Fla. 4th Dist. Ct. App. 1981).

195. See generally FLA. STAT. §§ 736.0501–.0504.

196. See, e.g., *Engelke*, 921 So. 2d at 696–97; see also *In re Edwards*, 356 B.R. 807, 810–11 (Bankr. M.D. Fla. 2006); *In re Alexander*, 346 B.R. 546, 550–51 (Bankr. M.D. Fla. 2006).

opinion even allowed the exemption for homestead real estate transferred to the trustee of a revocable trust when the trust instrument contained land trust language that the beneficial interests in the trust were personal property;<sup>197</sup> however, this is not advisable to do because the unlimited homestead exemption only applies to real estate. Another bankruptcy opinion held that a homestead in a revocable trust did not qualify for the Florida exemption from creditors because it was not owned by a natural person.<sup>198</sup> Thus, the transfer of homestead property to a revocable trust creates a risk in bankruptcy that the exemption may be questioned and that an appeal may be required in order to gain the benefit of the exemption.

If a settlor transfers his or her homestead to the trustee of a revocable trust, the homestead will be subject to the restrictions on inter vivos alienation and devise, so that the trustee cannot alienate it without joinder of the beneficial owner's spouse, if married.<sup>199</sup> Further, if the owner is survived by a minor child, the owner cannot devise the homestead.<sup>200</sup> The provisions of a revocable trust cannot provide for the distribution of the homestead when the settlor dies survived by a minor child, and the homestead will pass by statute rather than by will or trust provision.<sup>201</sup> The owner's descendants—including adult and minor children—will receive a vested remainder in the homestead, per stirpes, if the owner's spouse survives, or all of the homestead by intestacy if there is no surviving spouse.<sup>202</sup>

The Supreme Court of Florida has held that an owner of homestead cannot use a revocable trust to avoid the constitutional restrictions on devise,<sup>203</sup> and the Florida Legislature has enacted legislation that assumes the converse—that a settlor can dispose of homestead as and to the extent permitted by the constitution through the testamentary aspects of a revocable

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197. See *In re Cocke*, 371 B.R. 554, 557–58 (Bankr. M.D. Fla. 2007) (following *Engelke* even though the trust agreement provided that the beneficial interests in the trust were personal property).

198. *Crews v. Bosonetto (In re Bosonetto)*, 271 B.R. 403, 407 (Bankr. M.D. Fla. 2001). It is unclear from the opinion whether the trustee was an individual or a corporate fiduciary; however, the decision used entity language for a trust rather than looking at the beneficial or equitable ownership of the homestead stating: “This Court finds that the Trust does own the Florida property by the express terms of the Trust or, alternatively, under a resulting trust and because a trust is not a natural person, Defendant Bosonetto may not claim the Florida property is covered by the homestead exemption.” *Id.*

199. See FLA. CONST. art. X, § 4(c); see also FLA. STAT. § 732.4015.

200. FLA. CONST. art. X, § 4(c).

201. See FLA. STAT. § 732.4015(1)–(2). The will or trust provisions disposing of the homestead at death will be void if the Florida Constitution prohibits devise of the homestead.

202. FLA. CONST. art. X, § 4(c); FLA. STAT. §§ 732.401(1), .103(1).

203. See *Johns v. Bowden*, 66 So. 155, 159 (Fla. 1914); see also *In re Estate of Johnson*, 397 So. 2d 970, 973 (Fla. 4th Dist. Ct. App. 1981).

trust.<sup>204</sup> The Florida Constitution permits a married testator to devise his or her homestead to his or her surviving spouse if the testator is not survived by a minor child.<sup>205</sup> The Florida Probate Code provides that a married testator can “devise” homestead to a surviving spouse by reason of a provision in a revocable trust, defining a devise to include “a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor’s homestead.”<sup>206</sup> The usual meaning of the term “devise” refers to a disposition by will, not by inter vivos trust;<sup>207</sup> however, the general definition of the term “devise” has been expanded under the Florida Probate Code to mean “to dispose of real or personal property by will or trust” when the term is “used as a verb.”<sup>208</sup> Thus, the term “devise” under the Florida Probate Code would include the testamentary aspects of a revocable trust. Whether the legislature has the authority to expand the definition of a devise for purposes of the Florida Constitution is a separate question; however, it would appear that the persons who would contest the constitutionality of these provisions of the Florida Probate Code would be adult children of the testator or descendants of deceased children who would be entitled to a vested remainder in the homestead if the testator did not devise the homestead to the spouse as permitted by the constitution.<sup>209</sup> Given the fact that a settlor must have testamentary capacity to create a revocable trust and that the testamentary aspects of a revocable trust must be executed with the formalities required for a will, the Supreme Court of Florida might agree that the disposition of the settlor’s homestead to the settlor’s surviving spouse should be considered a devise within the meaning of the constitution when the homestead is to pass to the surviving spouse by a specific or residuary distribution from the trust.<sup>210</sup> If the trust disposition were held to be invalid, the homestead would pass by statute, with the spouse receiving a life estate and the descendants receiving a vested remainder,

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204. FLA. STAT. § 732.4015(1)–(2).

205. FLA. CONST. art. X, § 4(c).

206. FLA. STAT. § 732.4015(2)(b).

207. Compare FLA. STAT. § 733.805 (regarding the order of abatement for intestacy and *devises* under wills), with FLA. STAT. § 736.05053(2)–(3) (regarding the order of abatement for trust *distributions*).

208. FLA. STAT. § 731.201(10).

209. See FLA. CONST. art. X, § 4(c); FLA. STAT. §§ 732.401(1), .103(1).

210. See *Estate of Murphy*, 340 So. 2d 107, 109 (Fla. 1976) (permitting a married testator to devise homestead to the surviving spouse by a residuary devise in his will; although the court noted that “a specific devise is to be preferred”); see also *City Nat’l Bank of Fla. v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991) (applying a state statute allowing a spouse to waive homestead rights to determine whether a testator was treated as being survived by a spouse for purposes of the constitution).

unless the testator's will also devised any interest the settlor might have at the time of death in his or her homestead to the testator's surviving spouse.<sup>211</sup>

The Florida Constitution provides a homestead tax exemption and discount in addition to the creditor exemption, additional benefits for homesteads that qualify for the tax exemption, such as the Save Our Homes (SOH) amendment that limits annual increases for homestead property and portability provisions.<sup>212</sup> Further, the Florida Legislature has expanded some of the tax benefits for homesteads<sup>213</sup> and provided the general law for determining when a change in ownership requires assessment at just value and not at the lower SOH amount.<sup>214</sup> In many cases, the SOH limits on assessments and the veterans' discounts and exemptions save much more in taxes than the general homestead tax exemption.<sup>215</sup>

The Florida Constitution provides a homestead tax exemption for a "person who has the *legal or equitable title* to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner,"<sup>216</sup> and the Florida Legislature has declared that a person has "equitable title to real estate" "where the person's possessory right in such real property is based upon an instrument granting to him or her a beneficial interest for life."<sup>217</sup>

211. See FLA. STAT. § 732.401(1); FLA. STAT. § 732.401(1). Thus a devise in the will that parallels the trust distribution of the homestead could save an invalid trust provision.

212. See FLA. CONST. art. VII, §§ 4(c), 6.

213. See, e.g., FLA. STAT. § 196.031 (entitled "Exemption of homesteads"); § 196.041 (entitled "Extent of homestead exemptions"); § 196.071 (entitled "Homestead exemptions; claims by members of armed forces"); § 196.075 (entitled "Additional homestead exemption for persons 65 and older"); § 196.081 (entitled "Exemption for certain permanently and totally disabled veterans and for surviving spouses of veterans"); § 196.082 (entitled "Discounts for disabled veterans"); § 196.091 (entitled "Exemption for disabled veterans confined to wheelchairs"); § 196.101 (entitled "Exemption for totally and permanently disabled persons").

214. See, e.g., FLA. STAT. § 193.155 (entitled "Homestead assessments").

215. Compare FLA. CONST. art. VII, §§ 4(e), 6(c), and FLA. STAT. §§ 193.155, 196.071-.091, .101, with FLA. CONST. art. VII, § 6(a)-(d), and FLA. STAT. § 196.031.

216. FLA. CONST. art. VII, § 6(a) (emphasis added); see also FLA. CONST. art. VII, § (6)(d) (authorizing counties and municipalities to provide an additional exemption up to \$50,000 "to any person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner and who has attained age sixty-five and whose household income, as defined by general law, does not exceed twenty thousand dollars," subject to cost-of-living adjustments).

217. FLA. STAT. § 196.041(2). The Florida Administrative Code provides:

[t]he beneficiary of a passive or active trust has equitable title to real property if he is entitled to the use and occupancy of such property under the terms of trust; therefore, he has sufficient title to claim homestead exemption. . . . Homestead tax exemption may not be based upon residence of a beneficiary under a trust instrument which vests no present possessory right in such beneficiary.



The Florida Constitution also grants a discount for a veteran “age 65 or older who is partially or totally permanently disabled,” for “homestead property the veteran owns and resides in,” with the discount based on the percentage of his or her disability, without any reference to equitable or legal title.<sup>218</sup> Further, one of the legislative provisions exempting certain veterans from taxation applies for “real estate that is *owned* and used as a homestead by a veteran” and allows the exemption to carry over to the surviving spouse who “holds the *legal or beneficial title* to the homestead and permanently resides thereon.”<sup>219</sup> Another provides that “real estate *used* and owned as a homestead by an ex-servicemember . . . with a service-connected total disability . . . requiring specially adapted housing and required to use a wheelchair for his or her transportation is exempt from taxation” and allows the exemption to pass to the surviving spouse if the spouses owned the homestead “as an estate by the entirety.”<sup>220</sup> Thus, a transfer in trust of homestead property may jeopardize a disabled veteran’s homestead tax exemption or discount, and may affect the rights of certain surviving spouses. Further,

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FLA. ADMIN. CODE R. 12D-7.011 (1996); *see also* Robbins v. Welbaum, 664 So. 2d 1, 1 (Fla. 3d Dist. Ct. App. 1995) (granting a homestead tax exemption when the homestead was held in an irrevocable trust, a qualified personal residence trust—a QPRT, when the husband had a fifteen year possessory right and the wife had a ten year possessory right). The Miami-Dade County property appraisal department has sample trust language.

218. FLA. CONST. art. VII, § 6(e) (applying the discount “if the disability was combat related, the veteran was a resident of this state at the time of entering the military service of the United States, and the veteran was honorably discharged upon separation from military service” with the discount being “equal to the percentage of the veteran’s permanent, service-connected disability as determined by the United States Department of Veterans Affairs”); *see also* FLA. STAT. § 196.082(1) (entitled “Discounts for disabled veterans,” providing: “[e]ach veteran who is age 65 or older and is partially or totally permanently disabled shall receive a discount from the amount of the ad valorem tax otherwise owed on homestead property that the veteran owns and resides”).

219. FLA. STAT. § 196.081(1) (entitled “Exemption for certain permanently and totally disabled veterans and for surviving spouses of veterans” which exempts from taxation “[a]ny real estate that is *owned* and used as a homestead by a veteran”) (emphasis added); FLA. STAT. § 196.081(4)(c) (providing for carryover of exemption “as long as the spouse holds the *legal or beneficial title* to the homestead”) (emphasis added); *see also* FLA. STAT. § 196.081(3) (granting the exemption to the surviving spouse who “holds the *legal or beneficial title* to the homestead and permanently resides thereon”) (emphasis added). *Compare* FLA. CONST. art. VII, § 6(a), (d) (referring to “*equitable title*”) (emphasis added), *and* FLA. STAT. § 196.041(2) (declaring a possessory right of “a *beneficial interest* for life to be “equitable title to real estate”) (emphasis added), *with* FLA. STAT. § 196.081(3) (referring to “*beneficial title*”) (emphasis added). *But see* FLA. STAT. § 196.081(4)(a) (providing “[a]ny real estate that is *owned* and used as a homestead by the surviving spouse of a veteran”) (emphasis added).

220. FLA. STAT. § 196.091(1), (3) (emphasis added).

changes in ownership may result in the assessed value of the homestead increasing to just value.<sup>221</sup>

The Save Our Homes Amendment (SOH) and the Portability Amendment save taxes when the homestead is assessed based on the value when purchased—or when the amendment became effective—plus a maximum percentage increase, rather than the just value when greater.<sup>222</sup> The benefit of the SOH amendment can be lost when there is a change in ownership,<sup>223</sup> although the purpose of the Portability Amendment is to transfer some of that benefit to a new homestead.<sup>224</sup> The Florida Legislature has promulgated laws with respect to what constitutes a change of ownership, which may include “transfer of legal title or beneficial title in equity,” and provides which changes in ownership will not trigger reassessment of the homestead’s value for tax purposes.<sup>225</sup> Generally, transfers between legal and equitable title are allowed when the same person is entitled to the exemption before and after the transfer, and transfers between spouses during life or on death are allowed as well as some transfers by operation of law on death.<sup>226</sup>

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221. See FLA. STAT. § 193.155(3).

222. FLA. CONST. art. VII, § 4(d)(8); see also FLA. STAT. § 193.155(1), (8).

223. See FLA. CONST. art. VII, § 4(d)(8); FLA. STAT. § 193.155(3).

224. See FLA. CONST. art. VII, § 4(d)(8).

225. See FLA. STAT. § 193.155(3).

226. FLA. STAT. § 193.155(3). Reassessment at just value is not required if a change of ownership does not occur. A change of ownership does not occur when the homestead is transferred upon the owner’s death to his or her surviving spouse. FLA. STAT. § 193.155(3)(b) (“There is no change of ownership if . . . [t]he transfer is between husband and wife, including a transfer to a surviving spouse.”). See FLA. CONST. art. X, § 4(c) (allowing an owner to devise to his or her spouse if there is no surviving minor child). A change of ownership also does not occur if the homestead passes to the surviving spouse or descendants, or both, by operation of law when the owner is prohibited from devising the homestead or failed to devise it as permitted by law. FLA. STAT. § 193.155(3)(c) (“There is no change of ownership if . . . [t]he transfer occurs by operation of law under [section] 732.4015.”). *Florida Statutes* section 732.4015(1) prohibits devise as provided by the Florida Constitution when “the owner is survived by a spouse or a minor child or minor children [with the limited exception that] the homestead may be devised to the owner’s spouse if there is no minor child or minor children.” When the owner is survived by a spouse or minor child, and the homestead cannot be devised or is not devised to the spouse when permitted by law, it passes by operation of law, with a life estate to the surviving spouse and a vested remainder to the descendants, or if both do not survive, the homestead will pass to either surviving spouse or the descendants. FLA. STAT. §§ 732.102–.103, .401(1), .4015. There is a proposal to make the operation of law exception a constitutional one when the spouse, child, or grandchild inherits the homestead and makes it his or her own homestead and a proposal to limit the exception so that it applies only when the homestead passes by operation of law to the surviving spouse or a minor child or children. See Florida Senate Joint Resolution 112 for a proposed amendment to Article VII, section 4 of the Florida Constitution, and Florida Senate Bill 1884 for a proposed amendment to section 193.155 of the *Florida Statutes*. Fla. SJR 112 (2010); Fla. SB 1884 (2010).

Because of these benefits, particularly the SOH amendment and portability provisions, and the exemptions and discounts for disabled veterans and their surviving spouses, ownership of homestead is very important. Not all transfers in trust will qualify for these benefits. Before homestead property is to be transferred to a revocable trust, these laws should be reviewed to determine whether the transfer will affect the exemption, discount, or other benefits.

Although homestead property may be transferred to the trustee of a revocable trust, it may be better for the settlor to own the homestead outright in order to preserve the full benefit of the creditor and tax exemptions, during lifetime and upon death, and to take advantage of the probate process to determine protected homestead status.<sup>227</sup> In addition, transfers of real property may create title insurance issues that can be avoided by maintaining outright ownership until death.

b. *Tangible Personal Property, Including Exempt Property*

Tangible personal property may be held in trust, but it may not be the type of asset that adapts to ownership by a trustee for the use of beneficiaries, even if the settlor is the sole trustee and sole beneficiary during lifetime. From a practical perspective, it may be difficult to separate the legal and equitable ownership of the property and impose the obligations of legal ownership on a trustee in any meaningful way when the settlor or the beneficiary has the physical possession and use of the property. Further, it is unclear whether the transfer to the trust will have any positive benefits.

An individual may own tangible personal property that he or she wants to give to different people when he or she dies, without having to list them in a will and without having to make a codicil in order to change the list to add or remove items or change beneficiaries. Florida law would allow the testator to own and use jewelry or other items or collections of tangible personal property and to keep a list of the persons to receive them when the testator dies.<sup>228</sup>

The Florida Probate Code allows an individual to keep a separate written statement that disposes of items of tangible personal property without complying with the formalities required for a will, provided the testator's will refers to a written statement or list, the writing is signed by the testator and describes "the items and the devisees with reasonable certainty," and the

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227. See FLA. PROB. R. 5.405 (2009).

228. See FLA. STAT. § 732.515.

property is not used in a trade or business.<sup>229</sup> The list does not need to be in existence when the will is made, nor must it be incorporated by reference, and the testator can change the list after the will is made.<sup>230</sup> The list need not have any independent significance—“significance apart from its effect upon the dispositions made by the will”—and it need not be witnessed like a will.<sup>231</sup> If the testator kept more than one list, the most recent one prevails “to the extent of any conflict.”<sup>232</sup> If the testator made a list, which conflicts with the will because the will specifically devises property included in the list, the will prevails even if the list was made after the will was executed.<sup>233</sup>

There is no statute for tangible personal property held in trust that is comparable to section 732.515 of the *Florida Statutes*, and a settlor should not rely on the probate statute in order to keep a list to dispose of tangible personal property held in trust. If the settlor transfers items of tangible personal property to the trustee or declares that the settlor is holding these assets in trust, the trust instrument should contain provisions disposing of these assets when the settlor dies, and the settlor should sign the trust instrument with the formalities required for a will.<sup>234</sup> If the trust instrument refers to a list made by the settlor disposing of these assets based on the assumption that the trust can be drafted like a will, and the list is signed but not properly witnessed, the list may be treated as an invalid testamentary aspect of the trust and the assets may pass as part of the residuary disposition of the trust or by will or intestacy, rather than to the persons in the list.<sup>235</sup> If the list were in existence when the trust instrument was executed, the settlor could attempt to incorporate the provisions of the list into the trust instrument; however, there is no specific incorporation by reference statute for trusts.

It would appear that a settlor who owns tangible personal property held for personal use, such as jewelry, could transfer the property to the trustee of a revocable trust, and the settlor could retain the use and enjoyment of them during lifetime as the beneficiary of the trust. Title would need to be transferred to the trustee, or if the settlor were the trustee, the settlor could declare that the settlor was holding them in trust.<sup>236</sup> The trustee’s normal duties

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229. *Id.* Compare with *Florida Statutes* section 732.512 regarding documents incorporated by reference in a will and documents with independent significance.

230. FLA. STAT. § 732.515.

231. *Id.* Compare with *Florida Statutes* section 732.502 regarding the formalities for executing a will.

232. FLA. STAT. § 732.515.

233. *Id.*

234. *See* FLA. STAT. § 736.0403(2)(b).

235. *See id.*

236. *See* FLA. STAT. § 736.0401(1), (2).

would apply; however, they would be owed exclusively to the settlor.<sup>237</sup> Nevertheless, it would be difficult to see how a trustee could protect the assets while they were in the physical possession of the settlor. The trust instrument could provide for the disposition of the assets upon death if the trust were duly executed like a will.<sup>238</sup> Alternatively, the settlor could choose to own items of tangible personal property and devise them by will, or dispose of them pursuant to a list referred to in his or her will without involving the formalities of a trust or subjecting a trustee to duties that are difficult to fulfill or lack meaning in context.<sup>239</sup> Thus, although a settlor can transfer items of tangible personal property to a trust, it is generally better for the settlor to maintain ownership and control during lifetime and dispose of them by a will or a list. In the case of tangible personal property held by the settlor for investment, rather than personal use, the settlor may choose to transfer such property to a trust if the purpose of transferring them in trust is for fiduciary investment and management of assets. Further, if the settlor has a durable power of attorney, the attorney-in-fact may have the power to transfer tangible personal property to the trustee in the event the settlor becomes unable to manage his or her financial affairs.

If a settlor owns tangible personal property that could be exempt property when that person dies, the settlor may want to own these assets and not transfer them in trust to retain the potential exemption. Exempt property includes up to \$20,000 in net value of “[h]ousehold furniture, furnishings, and appliances in the decedent’s usual place of abode . . . as of the date of death.”<sup>240</sup> It also includes “two motor vehicles,” each of which does not weigh more than 15,000 pounds, “held in the decedent’s name and regularly used by the decedent or members of the decedent’s immediate family.”<sup>241</sup> Also, there is no dollar limitation on automobiles as there is for furniture.<sup>242</sup> The exemption applies if the decedent is survived by a spouse, or, if there is no surviving spouse, then to the decedent’s surviving children.<sup>243</sup> The surviving spouse or children can claim the property as exempt if it is devised to them, or if it is not specifically devised to someone else,<sup>244</sup> provided they

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237. FLA. STAT. § 736.0603(1).

238. FLA. STAT. § 736.0403(2)(b).

239. See FLA. STAT. § 732.515.

240. FLA. STAT. § 732.402(2)(a).

241. FLA. STAT. § 732.402(2)(b). A motor vehicle is defined as “[a]ny self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device, or moped.” FLA. STAT. § 316.003(21).

242. FLA. STAT. § 732.402(2)(a), (b).

243. FLA. STAT. § 732.402(1).

244. FLA. STAT. § 732.402(5). Technically, the property could be demonstratively devised to or away from the spouse or children. *Id.* Demonstrative devises are rarely used, but

file a timely petition for determination of exempt property.<sup>245</sup> The exempt property is exempt from all claims against the estate, except for debts secured by a “perfected security interest” on the property.<sup>246</sup> Transferring these assets, such as furniture and furnishings, to a revocable trust could result in the loss of the exemption when the settlor dies. This is because the trustee of a revocable trust has an obligation to contribute trust assets to the personal representative in the event the residuary estate is insufficient.<sup>247</sup> An exception exempts certain trust assets from this obligation, and that exception is for “property held or received by a trust to the extent that the property would not have been subject to claims against the decedent’s estate if it had been paid directly to a trust created under the decedent’s will or other than to the decedent’s estate.”<sup>248</sup> This exception applies to life insurance paid to the trustee of a revocable trust because the life insurance proceeds would have been exempt if they had been paid to the trustees of a testamentary trust, to the beneficiaries of the revocable trust, or to a beneficiary other than the decedent’s estate.<sup>249</sup> It does not appear to apply to property that would be exempt under section 732.402 of the *Florida Statutes*.<sup>250</sup> Further, there is a probate procedure for determining the items and values of exempt property and ordering the personal representative to surrender the exempt property to the entitled spouse or children.<sup>251</sup> Thus, it is beneficial to preserve this potential exemption and utilize the probate process to claim the exemption and to determine what property is exempt and who is entitled to it, rather than to transfer the property to a trust and risk the loss of the exemption and the probate process.

### 3. Written and Oral Revocable Trusts—Formalities and Burden of Proof

In order for a revocable trust or some of its provisions to be valid, certain formalities must be met.<sup>252</sup> Which formalities apply depends on the

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perhaps a devise of \$20,000 of furniture to be selected by the spouse or children, first from the testator’s furniture owned at death and then to be purchased by the personal representative using general estate assets would qualify. *See* FLA. STAT. § 732.402(2)(a), (5).

245. FLA. STAT. § 732.402(5), (6).

246. FLA. STAT. § 732.402(5); *see* FLA. STAT. § 731.201(4) (stating that the general definition of claims includes funeral expenses but excludes expenses of administration and estate taxes).

247. FLA. STAT. §§ 733.607(2), .707(3); FLA. STAT. § 736.05053(1).

248. FLA. STAT. § 733.707(3)(d).

249. *See* FLA. STAT. § 222.13(1); FLA. STAT. § 733.808(4).

250. *Compare* FLA. STAT. § 732.402 with FLA. STAT. § 733.707(3)(d).

251. FLA. PROB. R. 5.406 (2009).

252. FLA. STAT. § 736.0402.

provisions of the trust and the trust assets.<sup>253</sup> If the trust contains an interest in real estate in Florida, or certain provisions effective after the settlor's death, the trust must comply with certain statutory requirements.<sup>254</sup> If the trust does not revert to the settlor's estate when the settlor dies, and instead contains provisions for the disposition of those assets on or after the settlor's death, those provisions—the testamentary aspects of the trust—must be executed with the formalities required for a will.<sup>255</sup> If a settlor desires to create a trust of personal property during lifetime, with title to the assets reverting back to the settlor at death, and thus passing through the settlor's estate, the settlor can create the trust orally.<sup>256</sup>

In general, a revocable trust should be executed to comply with the strictest statutory requirements—being in writing and signed by the settlor in the presence of two witnesses, who sign in the presence of the settlor and each other—in order to validate it for purposes of holding real estate in trust and to validate the provisions of the trust effective after the testator's death.<sup>257</sup> Further, it should be notarized to facilitate recording, if desired, although it is not required to be notarized or recorded.<sup>258</sup> Although exceptions permit oral trusts of personalty during the settlor's lifetime and permit reversionary interests payable to the settlor's estate on death to be created without a writing executed like a will, such trusts are rarely used. Oral trusts, when allowed, are problematic because the terms of the trust may be incomplete or difficult to remember or prove and clear and convincing evidence may not be available to establish the oral terms.<sup>259</sup> Thus, revocable trusts should be in writing, signed by the settlor in the presence of at least two witnesses who sign in the presence of the settlor and each other, the settlor's signature should be notarized, and the trustee also should sign.<sup>260</sup> There is no statutory

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253. See FLA. STAT. § 736.0403(2)(b).

254. See FLA. STAT. § 689.05; FLA. STAT. § 736.0403(2)(a)–(b).

255. FLA. STAT. § 736.0403(2)(b).

256. See FLA. STAT. §§ 736.0403(2)(b), .0407.

257. See FLA. STAT. §§ 689.05, 736.0403(2)(a).

258. See FLA. STAT. § 736.0403(2)(b). With respect to real estate, usually the conveyance, by deed, is separate from the trust provisions in the trust instrument. See FLA. STAT. § 689.01. In the unusual case where the deed and trust provisions are in the same document, the document would also need to be signed like a deed in accordance with sections 689.06 and 689.01 of the *Florida Statutes*.

259. See *id.*; *Rosen v. Rosen*, 167 So. 2d 70 (Fla. 3d Dist. Ct. App. 1964). Had the trust in *Rosen* been a revocable trust created under the FTC, the provisions after the settlor's death would not have been valid because they are testamentary aspects that require a writing executed with the formalities for a will. See FLA. STAT. § 736.0403(2)(b).

260. See FLA. STAT. §§ 732.502, .504. If the settlor is unable to sign, the settlor can direct another to sign for the settlor in the settlor's presence, and the settlor can acknowledge the signing in the presence of the witnesses. FLA. STAT. §§ 732.502(1)(a)2, (1)(b)2b. If the trust

self-proof affidavit for a revocable trust and no statutory provisions requiring proof of the due execution of a trust as there are for wills; although some attorneys attach an affidavit to a revocable trust that is adapted from the statutory self-proof form for wills.<sup>261</sup> Alternatively, other laws may apply with respect to the required formalities for trusts executed outside of Florida or by non-Florida domiciliaries.<sup>262</sup>

When the settlor funds the revocable trust by transferring assets to the trustee during the settlor's lifetime, the settlor also must comply with the formalities required to effectuate those transfers. For example, when transferring funds from a checking account, a check can be written payable to the trustee of the revocable trust. When transferring real property, a deed would be required<sup>263</sup> and should be recorded; although recording is not required for the validity of the conveyance. When transferring certificates of deposits, the financial institution would provide the documents necessary to transfer the accounts. When transferring treasury obligations owned by the settlor, the Department of Treasury prescribes the forms and the procedures for transferring such obligations. When transferring stocks or bonds, a written assignment may be required, and in some cases, the original stock certificate or bond must be sent to the transfer agent along with the assignment. When transferring an account, such as a brokerage account—that holds securities in the name of a nominee—the brokerage firm can provide the forms necessary to change ownership of the account, and the transfer of that account would transfer ownership to the assets held in that account, which could include a number of different properties, including: cash, stock, bonds, certificates of deposit, and treasury obligations. When designating the trustee as the beneficiary of a life insurance policy, the insurance company or agent can provide the necessary forms required to be filed with the company, along with sample or appropriate language acceptable to the insurance company.

When the settlor is the sole trustee, the settlor may transfer ownership of the assets to be held in trust by transferring those assets to the settlor as trustee of the revocable trust. Alternatively, the settlor can accomplish this by declaration, declaring that he or she “holds identifiable property as trustee.”<sup>264</sup>

In some cases, the settlor may choose to be the sole trustee and the sole beneficiary during the settlor's lifetime. Although this type of revocable

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includes real estate, see *Florida Statutes* section 689.05 as to whether the signature of an agent or proxy would be allowed.

261. See FLA. STAT. §§ 732.503, 733.201 (regarding self-proofs of wills).

262. FLA. STAT. § 736.0403(1), (2)(b).

263. FLA. STAT. § 689.06; see also FLA. STAT. § 689.01.

264. FLA. STAT. § 736.0401(2).



trust is a valid trust, during the settlor's lifetime, it is a trust in form more than substance, with the settlor owing fiduciary duties only to himself or herself. Nevertheless, it is a trust, and it is important for the settlor to respect the form of the trust and comply with the formalities required for a trust, so that the trust will be effective when the settlor dies.

### C. *Trustee and Beneficiaries of Revocable Trust*

In order for a settlor to create a revocable trust, the general requirements that there be a trustee with duties, that the trust have definite beneficiaries, and that the sole trustee must not be the sole beneficiary of the trust apply.<sup>265</sup> Although these general requirements apply, they may not be as meaningful during the settlor's lifetime if the settlor is the sole trustee and sole beneficiary during that time.

#### 1. Trustee of Revocable Trust with Duties to Perform

In order to create a trust, such as a revocable trust, the trust must have a trustee and that trustee must have duties;<sup>266</sup> however, while the trust is revocable, "the duties of the trustee are owed exclusively to the settlor."<sup>267</sup> If the requirements necessary to create a trust, including the requirement of having a trustee with duties, are met, the trust will not be invalid because the settlor possesses the power to: 1) "revoke, amend, alter, or modify the trust in whole or in part;" 2) "remove the trustee or trustees and appoint a successor trustee or trustees;" or 3) "control the trustee or trustees in the administration of the trust."<sup>268</sup> These powers would be powers exercisable by the settlor in the settlor's individual capacity rather than in any fiduciary capacity.

If someone other than the settlor is the trustee, then the requirement that the trustee have duties is significant; however, the significance of these duties is qualified by the law that provides these duties "are owed exclusively to the settlor," while the trust is revocable.<sup>269</sup> One of the usual consequences of the trustee having a duty is that the breach of the duty exposes the trustee to liability to the beneficiaries, and the beneficiaries have standing to apply to the court for relief.<sup>270</sup> By contrast, in a revocable trust, the breach of a duty exposes the trustee to liability to the settlor instead, so that the settlor

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265. FLA. STAT. § 736.0402(1)(c)–(e).

266. See FLA. STAT. § 736.0402(1)(d).

267. FLA. STAT. § 736.0603(1).

268. FLA. STAT. § 689.075(1)(a), (d), (e).

269. See FLA. STAT. § 736.0603(1).

270. See FLA. STAT. §§ 736.1001(1), (2), .1002.

would have standing in court.<sup>271</sup> Further, the settlor would have the power to amend or revoke the trust, which would include the power to remove the trustee and appoint another trustee.<sup>272</sup>

In the context of a revocable trust, what duties must the trustee have to the settlor when the trustee is not the settlor? Are these the same duties that a trustee of any trust must have in order to create a trust and must these duties be active, enforceable duties as envisioned by the FTC's legislative history—to prevent passive trusts and to require the trustee to “have enforceable duties to perform?”<sup>273</sup> It would seem that the settlor of a revocable trust should expressly impose duties on a trustee—in addition to those imposed by statute, such as the duty of loyalty—but that those duties imposed by the settlor should be subject to the powers retained by the settlor. For example, if the trust instrument provided that the trustee would distribute all income and principal to the settlor, as and when directed by the settlor, then the trustee would have the duty to comply with the settlor's direction.

The *Florida Statutes* provide that if the trust meets the requirements necessary to create a trust, which would include the requirement of having a trustee with duties, the trust will not be invalid “[b]ecause the settlor is, at the time of the execution of the instrument, or thereafter becomes, [the] sole trustee.”<sup>274</sup> If a settlor creates a revocable trust, with the settlor as the sole trustee and the sole beneficiary during the settlor's lifetime, then the requirement that the trustee have duties should only apply to require a trustee with duties after the settlor's death—or when the settlor ceases to serve as the sole trustee or the trust ceases to be revocable. The legislative history for this requirement for the creation of a trust under the FTC notes that “[t]he requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust;”<sup>275</sup> however this rationale does not apply while a trust is revocable by the settlor because during that time the trustee's duties are enforceable by the settlor not the beneficiaries of the trust.<sup>276</sup>

One general rule for trusts is that a trust will not fail for lack of a trustee.<sup>277</sup> The settlor of a revocable trust can expressly retain the power to fill

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271. See FLA. STAT. § 736.0604(1).

272. See FLA. STAT. § 736.0602(1).

273. See *supra* note 97 and accompanying text and discussion *supra* Part III.C.1.

274. FLA. STAT. § 689.075(1)(g).

275. CS for SB 1170 Staff Analysis, *supra* note 92, at 14 n.124 (citing FLA. STAT. § 736.0402(1)(e); accord *Willey v. W.J. Hoggson Corp.*, 106 So. 408, 412 (Fla. 1925)).

276. See FLA. STAT. § 736.0603(1).

277. See *supra* note 74 and accompanying text.

any vacancy.<sup>278</sup> Even if the power is not expressly retained, the settlor's penumbral power to amend or revoke would encompass the power to amend the trust to appoint a new trustee to fill a vacancy. If no person is "named or designated pursuant to the terms of the trust to act as successor trustee," then the FTC provides that the vacancy will be filled by a person selected by the "unanimous agreement of the qualified beneficiaries," but if they do not appoint one, then by the court.<sup>279</sup> The term "qualified beneficiary" includes present beneficiaries, such as the settlor, but it also can include some future beneficiaries.<sup>280</sup> It would make sense that while the trust is revocable that the settlor be treated as the only qualified beneficiary, particularly since the trustee only owes duties to the settlor during that time. The general rules in the FTC for filling a trust vacancy should be qualified when applied to a revocable trust so that the vacancy is filled by the settlor unless the settlor lacks the capacity to make that appointment. If the legislature amends the law, the legislature also can address whether an attorney-in-fact could make the appointment or, if there is a guardian of the settlor's property, whether the appointment should be made by the guardian with the court's permission under the guardian statutes or by the circuit court under the FTC.

## 2. Definite Beneficiary of Revocable Trust or Charitable Purpose Requirement

A private trust must have a definite beneficiary or beneficiaries that can be ascertained when the trust is created or in the future, with future interests vesting or failing within the applicable period under the rule against perpetuities.<sup>281</sup> Alternatively, the trust must be a charitable trust with a charitable purpose.<sup>282</sup> If the revocable trust is otherwise valid, the trust will not be invalid because: (a) "the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof;" (b) the settlor possesses "the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distrib-

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278. See FLA. STAT. § 689.075(1)(d); see also *id.* § 736.0704(3)(a).

279. FLA. STAT. §§ 736.0201(4)(b), 736.0704(3)(a)–(c).

280. See FLA. STAT. § 736.0103(14)(a)–(c).

281. FLA. STAT. § 736.0402(1)(c), (2); see also FLA. STAT. § 689.225(2), (4) (containing statement of Florida's statutory rule against perpetuities, with provisions for judicial reformation).

282. FLA. STAT. § 736.0402(1)(c)1. Two other types of trusts may be created without a definite beneficiary: a pet or animal trust under section 736.0408 of the *Florida Statutes* and a noncharitable purpose trust under section 736.0409 of the *Florida Statutes*. FLA. STAT. § 736.0402(1)(c)2–3.

uted;” or (c) the settlor has the power to “withdraw from the trust all or any part of the principal or income at one time or at different times.”<sup>283</sup>

The settlor may be a beneficiary of the trust and often is the sole beneficiary of a revocable trust during the settlor’s lifetime. The settlor could provide that the trust assets will be paid to the settlor’s estate upon death—a “pour-up” trust; however, this is rarely done. Instead, the settlor usually provides for the trust assets to be distributed outright when the settlor dies or for the assets to continue to be held in trust for various beneficiaries. When the trust provides for outright distributions when the settlor dies, these provisions are comparable to the devises the settlor would make in a will if the settlor owned the property in his or her own name. When the trust continues after the settlor’s death, these provisions are comparable to the provisions that would be contained in a testamentary trust. Designating the settlor and the settlor’s estate or other beneficiaries after the settlor’s death as beneficiaries of the trust would satisfy the requirement that the trust have definite beneficiaries.<sup>284</sup>

With respect to the contingent future interests in the revocable trusts, the settlor’s retention of the right to amend or revoke the trust prevents any remainder interests from vesting while the trust is revocable.<sup>285</sup> Further, the period for the rule against perpetuities would begin to run on the settlor’s death—or when the settlor relinquishes the right to revoke or the trust otherwise becomes irrevocable.<sup>286</sup> If the trust provides for outright distributions when the settlor dies, there will not be any perpetuities problem because the trust interests will vest when the settlor dies. If the trust continues after the settlor’s death, then these trust provisions would need to comply with the Florida rule against perpetuities. All of the settlor’s children and grandchildren living when the settlor dies would be lives-in-being, and the trust could provide for distributions to them at any ages, or could provide for the trust to continue after their deaths without a problem with the rule. For interests for beneficiaries born after the settlor’s death—such as after born grandchildren—the trust could provide for distributions until age twenty-one, and could provide for their interests to vest at age twenty-one in order to satisfy the rule against perpetuities.<sup>287</sup> Alternatively, the trust could use a term of up

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283. FLA. STAT. § 689.075(1)(b), (c), (f).

284. See FLA. STAT. § 736.0402(1)(c).

285. See generally FLA. STAT. § 689.225.

286. See generally FLA. STAT. § 689.225(2).

287. See FLA. STAT. § 689.225(2)(a)1.

to either ninety or 360 years after the settlor's death, with vesting required at the termination of that period.<sup>288</sup>

### 3. Settlor as Sole Beneficiary and Trustee of Revocable Trust During Lifetime

In order to create a valid trust, the settlor must not be the sole trustee and the sole beneficiary.<sup>289</sup> This rule applies to a revocable trust, and the settlor may serve as the sole trustee of a revocable trust.<sup>290</sup> If the settlor is a beneficiary of a revocable trust, there must be at least one other trustee or at least one other beneficiary with a present or future interest in the trust for the valid creation of the trust.<sup>291</sup> In determining whether a trust has a sole beneficiary, present as well as future beneficiaries count. In determining whether a trust has a sole trustee, only the trustee then serving is counted. The fact that there are successor trustees nominated to serve if a trustee is unable or unwilling to serve does not prevent the present trustee from being the sole trustee.

For purposes of this rule, there are two polar situations to consider: 1) when the settlor is the sole trustee of the trust, and 2) when the settlor is the sole beneficiary of the trust. In between these two are trusts where the settlor is a beneficiary, but not the sole beneficiary, and trusts where the settlor is not a trustee or is a co-trustee and thus not the sole trustee.

If the settlor wants to serve as the sole trustee, the trust would be required to have at least one beneficiary other than the settlor. This beneficiary could be designated to receive the trust after the settlor dies and that beneficiary's interest could be contingent on the beneficiary surviving the settlor and subject to the settlor's power to change the beneficiary by amending or revoking the trust.<sup>292</sup> This trust would allow the settlor to be the sole trustee

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288. FLA. STAT. § 689.225(2)(a)2, (2)(f). The decision to use a term of the ninety or 360 years depends in part on whether the settlor wants the beneficiaries to be able to modify the trust without approval of the court or wants the court to be able to modify the trust against the settlor's expressed intent based on what is or is not in the best interests of the beneficiaries. See FLA. STAT. §§ 736.04115, .0412. Further, if the settlor attempts to use a savings clause based on the later of the twenty-one year rule or the ninety or 360 year rule, the twenty-one year rule will apply. See FLA. STAT. § 689.225(2)(e)1-2.

289. FLA. STAT. § 736.0402(1)(e).

290. See FLA. STAT. § 689.075(1)(g) (authorizing the settlor to serve as the sole trustee).

291. See *supra* note 100 and accompanying text.

292. If that beneficiary's interest is contingent on surviving the settlor, the settlor should add another contingent beneficiary in order to avoid a potential reversion to the settlor's estate if the first contingent beneficiary fails to survive the settlor.

and sole beneficiary during the settlor's lifetime but not the sole beneficiary during the entire period of the trust.

If the settlor wants to be the sole beneficiary of the trust, with the settlor's estate receiving any remaining assets when the settlor dies,—a “pour-up” trust—the settlor cannot be the sole trustee. In that case, the settlor would need to appoint another person—whether an individual or a corporation—to serve as the sole trustee or to serve as a trustee along with the settlor as a co-trustee. Thus, the settlor would be the sole beneficiary and could be a co-trustee but could not be the sole trustee.

Revocable trusts rarely are created with a sole beneficiary during the entire period of the trust. They usually have some contingent beneficiaries. Thus, a settlor could create a revocable trust with the settlor being the sole trustee and sole beneficiary during the settlor's lifetime, with contingent beneficiaries receiving the trust property upon the settlor's death. The primary purpose of this type of trust would be to provide for disposition of the assets upon the settlor's death through the trust rather than a will. Or the settlor could serve as a co-trustee, in which event the settlor would be neither the sole trustee nor the sole beneficiary. The settlor might choose to serve with a co-trustee to give the co-trustee the opportunity to become acquainted with the settlor's affairs during the settlor's lifetime and so that the co-trustee would be able to serve alone in the event of the settlor's incapacity or death—or with a new co-trustee.

In the unusual case where the settlor creates a pour-up revocable trust for the sole benefit of the settlor, with the assets passing as part of the settlor's probate estate, the primary purpose of the trust would be to appoint a trustee to administer the assets during the settlor's lifetime. More commonly, if a settlor creates a trust for fiduciary administration of assets during his or her lifetime or in the event of incapacity, the settlor also wants to provide for the distribution of those assets upon death by the provisions of the trust rather than by will. Thus, pour-up trusts are rarely used.

It would not make sense for a settlor to create a trust where the settlor was the sole trustee, if the settlor intended for distributions to be made only to the settlor or the settlor's estate. Although it is possible that a settlor could create a trust and at a later date become the sole beneficiary of the trust, this possibility could be avoided by providing for contingent beneficiaries of the trust in the event that none of the beneficiaries of the trust survive the settlor and the termination of the trust. These contingent beneficiaries could be the persons who would be the settlor's heirs if the settlor died intestate at that time. Having a catch-all provision would avoid the possibility of the settlor being the sole trustee and sole beneficiary and, thus, avoid the settlor becoming the sole owner by merger.

## IV. IMPORTANT PROVISIONS OF A REVOCABLE TRUST

When designing a revocable trust it is important to consider: 1) the provisions that will be effective during the settlor's lifetime; and 2) the provisions that will be effective after the settlor's death. These provisions include administrative and dispositive provisions. During the settlor's lifetime, the trust may contain special provisions that are effective if the settlor becomes incapacitated. In addition, the trust may contain provisions applicable during the administration of the settlor's estate, regarding payment to the estate for the estate's obligations and administration expenses, and the apportionment and payment of any estate taxes.<sup>293</sup> Further, the trust may provide for outright distributions after the settlor's death or may provide for the trust to continue after the settlor's death. It is important to consider how the provisions of the trust interrelate with the provisions of the will and the laws and rules governing probate, as well as other documents and laws, such as a durable power of attorney and the laws of guardianship.

A. *Right to Revoke or Amend*

An inter vivos trust created on or after July 1, 2007 may be revoked or amended unless "the terms of [the] trust expressly provide that the trust is irrevocable."<sup>294</sup> This rule applies to written trust instruments as well as oral trusts.<sup>295</sup> Under the FTC rule, both the right to revoke and the right to amend are implied unless the trust expressly provides that the trust is irrevocable.<sup>296</sup> By contrast, a trust created before then was irrevocable unless the right to revoke was expressly retained,<sup>297</sup> and if the right to revoke was expressly retained, it should also have included the right to amend.<sup>298</sup> Notwithstanding

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293. See FLA. STAT. § 736.05053(2). The trust cannot change the trustee's obligation under the Florida Probate Code and the FTC "to pay expenses and obligations of the settlor's estate." FLA. STAT. § 736.0105(2)(m); see also FLA. STAT. §§ 733.607(2), .707(3), .805 (regarding this obligation). The will and trust, however, may contain other provisions that relate to this obligation and the abatement of devises and trust distributions. See, e.g., FLA. STAT. §§ 733.805(1), 736.05053(2).

294. FLA. STAT. § 736.0602(1).

295. See FLA. STAT. §§ 736.0602(3), .0407.

296. FLA. STAT. § 736.0602(1).

297. See CS for SB 1170 Staff Analysis, *supra* note 92, at 25.

298. See, e.g., *Preston v. City Nat'l Bank of Miami*, 294 So. 2d 11, 14 (Fla. 3d Dist. Ct. App. 1974) ("The terms of a trust may be modified if the settlor and all the beneficiaries consent. Having the power to terminate, they obviously have the power to create a new trust or to modify or change the old. In Florida, this principle has long been recognized."). See also CS for SB 1170 Staff Analysis, *supra* note 92, at 26–27. If the right to revoke did not

this change in the default rule, the right to revoke and the right to amend should be expressly stated in the trust instrument. The legislative history for the FTC states: “The new rule assumes that most well drafted trust instruments explicitly say whether they are revocable and when a trust instrument does not clarify this, the omission was likely accidental.”<sup>299</sup> A comment to the UTC notes that the “[Uniform Trust] Code presumes revocability when the instrument is silent because the instrument was likely drafted by a non-professional, who intended the trust as a will substitute.”<sup>300</sup>

The settlor may choose to provide the manner for revocation or amendment, such as by delivery of a written document to the trustee.<sup>301</sup> If the settlor specifies the manner of revocation or amendment in the trust instrument or in the terms of an oral trust, that manner is exclusive; however, the FTC only requires substantial compliance with the method so provided.<sup>302</sup> If the settlor does not provide a method, then the trust can be revoked or amended by the settlor in a “later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust” or by “[a]ny other method manifesting clear and convincing evidence of the settlor’s intent.”<sup>303</sup>

To be cautious and to provide clear evidence of intent, the amendment or revocation of the testamentary aspects of a trust should be in writing, executed like a will in Florida,<sup>304</sup> and the settlor should include directions regarding the delivery of the trust assets—to the settlor or to others specified by the settlor.<sup>305</sup> If a joint trust is created, such as by a husband and wife, the trust should address the right of revocation and amendment during the joint lives of the settlors, as well as after the death of either settlor. In a joint trust, generally each settlor has the power to unilaterally revoke the trust but only

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include the right to amend, the settlor could revoke the trust and then create a new one to accomplish the desired amendment.

299. CS for SB 1170 Staff Analysis, *supra* note 92, at 25–26. The legislative history also notes: “If the assumptions underlying the revocable by default rule are wrong in a particular case, it is easier to make a revocable trust irrevocable than it would be to reform an irrevocable trust into a revocable one.” *Id.* at 26 n.210.

300. UNIF. TRUST CODE § 602 cmt.

301. See FLA. STAT. § 736.0602(3)(a).

302. *Id.*

303. FLA. STAT. § 736.0602(3)(b)1–2. Florida departs from the UTC in this regard. See UNIF. TRUST CODE § 602(c)(2). The FTC allows the settlor to use alternate methods “[i]f the terms of the trust do not provide a method,” while the UTC allows the settlor to use alternate methods “if the terms of the trust do not provide a method *or the method provided in the terms is not expressly made exclusive.*” FLA. STAT. § 736.0602(3)(b); UNIF. TRUST CODE § 602(c)(2) (emphasis added).

304. See *infra* text accompanying notes 327–34.

305. See FLA. STAT. § 736.0602(4).



with respect to “the portion of the trust property attributable to that settlor’s contribution,” and if all of the settlors do not join in the revocation, the trustee has an obligation to notify the other settlors of the partial revocation.<sup>306</sup>

The comments to the UTC note:

Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor’s intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor’s intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document.<sup>307</sup>

While a trust cannot be created without funding, i.e. without a res, Florida law separates the revocation of a trust from its “unfunding,” providing that “[u]pon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.”<sup>308</sup> Thus, technically a trust can be revoked even though assets are still titled in the name of the trustee. From a planning standpoint, when deciding to revoke a trust, the settlor should consider the reason for the revocation and the settlor’s intent with respect to the trust assets. The settlor might want the assets returned to the settlor’s name and control and subject to disposition by will, or the settlor might want to make inter vivos gifts of the assets. The settlor can prepare the necessary documents to effectuate the revocation and direct the trustee with respect to the trust assets at the same time. In addition, when a settlor revokes a trust, the settlor should also amend his or her will, if it contains a devise that pours over to the trust, in order to avoid intestacy or partial intestacy.<sup>309</sup>

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306. FLA. STAT. § 736.0602(2)(b). Presumably these rights may be changed by the trust instrument. *See, e.g., id.* § 736.0602(1). There is a special rule for community property, whereby either spouse may revoke “acting alone,” but both spouses must join in an amendment for it to be effective. FLA. STAT. § 736.0602(2)(a).

307. UNIF. TRUST CODE § 602 cmt. (amended 2005).

308. *See* FLA. STAT. § 736.0602(4).

309. *See* FLA. STAT. §§ 732.101(1), .513(4); *see also infra* note 332 and accompanying text.

The comments to the UTC address the settlor's incapacity, noting: "The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor's death or the power of revocation is released."<sup>310</sup> The settlor may want to consider whether the settlor would want an agent or guardian to have the power to revoke the trust, to amend the trust during the settlor's lifetime, or to amend its testamentary aspects. The FTC notes that a "settlor's powers with respect to revocation, amendment, or distribution of trust property" can be exercised by a guardian of property, only as provided by the guardianship statute, and by an attorney-in-fact, only as authorized by the durable power of attorney statute.<sup>311</sup> A plenary guardian of property and certain limited guardians may "[c]reate or amend revocable trusts or create irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning," but only with court approval; however, the statute does not provide for the revocation of the trust.<sup>312</sup> An attorney-in-fact may not "[e]xecute or revoke any will or codicil for the principal" and may not "[c]reate, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney."<sup>313</sup> Thus, if a revocable trust created by the settlor is a "document or other disposition effective at the principal's death," the durable power of attorney statute provides that a principal may expressly authorize an attorney-in-fact to amend, modify or revoke it. Does this mean that a guardian or agent can amend or revoke a revocable trust when the settlor lacks testamentary capacity, or, that a guardian or agent may change testamentary aspects without complying "with the formalities required for the execution of a will?"<sup>314</sup>

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310. See UNIF. TRUST CODE § 103 cmt.; see also FLA. STAT. § 736.0602(3)(b)1.

311. FLA. STAT. § 736.0602(5), (6).

312. FLA. STAT. § 744.441(19). Regarding inter vivos trusts, *Florida Statutes* section 744.441(19) applies to plenary guardians and to "a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report." Regarding wills, a guardian cannot make a will for a ward and can only execute a codicil for a ward in order to obtain the maximum charitable deduction for a split interest trust created by the principal under his or her will. FLA. STAT. § 744.441(18). Regarding gifts, the right "to make any gift or disposition of property" may be removed from the ward and delegated to the guardian, who with court approval may "[m]ake gifts of the ward's property to members of the ward's family in estate and income tax planning procedures." FLA. STAT. §§ 744.3215(3)(d), 441(17).

313. FLA. STAT. § 709.08(7)(b)4–5.

314. See FLA. STAT. §§ 736.0403(2)(b), .0601.

It is not known how often these powers are exercised by an attorney-in-fact, or by a guardian, with a court's approval, without any objection being raised by family members or beneficiaries. There are a few Florida appellate decisions that have discussed a guardian's powers, with the court's approval, to make a gift to family members, to create or amend a trust, to designate a beneficiary of a retirement account, and the guardian's limited power to execute a codicil to reform a split interest trust for tax purposes.<sup>315</sup> One case specifically prevented a guardian from creating a trust with beneficiaries that were different from the beneficiaries under the ward's estate planning documents when she was adjudicated incompetent.<sup>316</sup>

The right to devise property is one of an owner's basic property rights "to acquire, possess, and protect property," which include the rights to devise and dispose of property; however, those rights are subject to legislative regulation that is reasonable and otherwise constitutional.<sup>317</sup> If an attorney-in-fact or guardian is precluded from making a will, he or she should not be permitted to create a trust that contains testamentary aspects or to amend the testamentary aspects of an existing trust, even if the amendment would

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315. See, e.g., *Sherry v. Klevansky (In re Guardianship of Sherry)*, 668 So. 2d 659, 660–61 (Fla. 4th Dist. Ct. App. 1996) (considering power to create trust under *Florida Statutes* section 744.441(19) and precluding guardian from creating trust for ward that would "pass on her death to a beneficiary different from the ones who would receive her assets at death under the estate planning documents existing on the date of her adjudication," noting that "[t]here is no reason to believe that the legislature intended section 744.441(19) to negate the general principle that a guardian cannot exercise a purely personal right of the ward"); *Goeke v. Goeke*, 613 So. 2d 1345, 1346, 1348 (Fla. 2d Dist. Ct. App. 1993) (considering power to make gifts for estate planning and power to enter into contracts in ward's best interest under *Florida Statutes* section 744.441(17), (19) and (21), remanding case for determination of whether beneficiary of individual retirement account should remain the same as the old designation—and benefit the guardian/son—or be changed to be consistent with the ward's will—to benefit the guardian/son and his twin brother); *In re Guardianship of Bohac*, 380 So. 2d 550, 551, 553 (Fla. 2d Dist. Ct. App. 1980) (considering power to make gifts under *Florida Statutes* section 744.441(17) and affirming lower court's decision not to authorize significant gifts to individuals who were not close relatives. The proposed gifts by seventy-six year old ward of \$400,000 would have left her with \$550,000 and could have saved \$15,000 in income tax and potentially \$26,000 in estate tax).

316. *Sherry*, 668 So. 2d at 659–61.

317. FLA. CONST. art. I, § 2. With respect to the right to devise and the legislative authority to regulate the right to devise, see *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 68 (Fla. 1990), holding that the right to devise is a basic property right that is "subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order, [and] general welfare" (quoting *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976)). In *Shriners*, the court also found "that section 732.803 violate[d] the equal protection guarantees of article I, section 2 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution." *Id.* at 69.

conform the testamentary aspects to the dispositive provisions of an existing will.<sup>318</sup> Extending this prohibition to trusts with testamentary aspects is consistent with other extension of will law to such trusts, including the requirement that a settlor of a revocable trust have the capacity to make a will and that the testamentary aspects be executed with the formalities required for the execution of a will.<sup>319</sup> If a settlor has testamentary capacity—even though he or she has a guardian, property, or an attorney-in-fact—the settlor should amend or revoke the trust by signing or directing another to sign for him or her;<sup>320</sup> and if the settlor lacks capacity, neither the guardian nor the attorney-in-fact should amend or revoke the testamentary aspects. If the settlor is unable to manage his or her financial affairs, or has a guardian of property and needs assets from the trust for the settlor's benefit, then the attorney-in-fact or guardian should have the authority to act for the settlor to make sure the trust assets are used for the settlor's benefit and, if necessary, to exercise the settlor's power to withdraw trust property or revoke all or a portion of the trust for this purpose—but not for the purpose or with the effect of changing who will receive the assets when the settlor dies.<sup>321</sup>

Florida law allows a will to be revoked by an act of revocation performed by the testator or by another at the testator's direction and in the testator's presence, if the testator intended to revoke the will.<sup>322</sup> This would include a will that devises real property. Acts of revocation include "burning, tearing, canceling, defacing, obliterating, or destroying" the will or codicil "with the intent, and for the purpose, of revocation."<sup>323</sup> Further, will law provides a presumption of revocation when the original will cannot be found,<sup>324</sup> and also provides a process for proving the contents of a lost will that was not revoked but cannot be found.<sup>325</sup> These provisions for wills raise questions concerning the permissible methods for revoking a revocable trust

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318. See FLA. STAT. § 736.0403(2)(b) for the definition of testamentary aspects.

319. See FLA. STAT. §§ 736.0403(2)(b), .0601.

320. See FLA. STAT. § 732.502(1)(a).

321. See FLA. STAT. § 744.441(1), (2), (11), (19); *Sherry v. Klevansky* (*In re* Guardianship of Sherry), 668 So. 2d 659 (Fla. 4th Dist Ct. App. 1996). Others might argue that since a guardian is permitted to make a gift to a member "of the ward's family in estate and income tax planning procedures," with court approval, the guardian should be allowed to execute or amend a will or a revocable trust to make transfers upon death to family members for the same reasons. See FLA. STAT. § 744.441(17).

322. FLA. STAT. § 732.506.

323. *Id.*

324. See *Upson v. Estate of Carville*, 369 So. 2d 113, 114 (Fla. 1st Dist. Ct. App. 1979) (citing *In re* Washington's Estate, 56 So. 2d 545, 545 (Fla. 1952)). See also *Wider v. Wider* (*In re* Wider's Estate), 62 So. 2d 422, 425 (Fla. 1952) (Futch, J., dissenting).

325. FLA. STAT. § 733.207.

and whether a presumption of revocation should apply if a revocable trust cannot be found when the settlor dies.

With respect to revocation, the intent of the drafters of the UTC was to allow, but not encourage, revocation by act.<sup>326</sup> The FTC defers to the settlor to express a method of revocation in the trust and then provides alternate methods if the trust is silent; however, the FTC qualifies this by making all these provisions “[s]ubject to s[ection] 736.0403(2)” of the *Florida Statutes*.<sup>327</sup> Specifically, section 736.0602(3) provides “[s]ubject to s[ection] 736.0403(2), the settlor may revoke or amend a revocable trust [b]y substantial compliance with a method provided in the terms of the trust”<sup>328</sup> and when “the terms of the trust do not provide a method,”<sup>329</sup> by certain provisions of the settlor’s will or by “[a]ny other method manifesting clear and convincing evidence of the settlor’s intent.”<sup>330</sup> Section 736.0403(2) provides that: 1) “[n]o trust or confidence of or in any messuages, lands, tenements, or hereditaments shall arise or result unless the trust complies with the provisions of s. 689.05;” and 2) “[t]he testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state.”<sup>331</sup> This raises the question as to how the right to revoke or amend a trust is subject to the provisions of section 736.0403(2), which pertain to the formalities required for a trust in land to “arise” or for the testamentary aspects of a revocable trust to be valid. Further, the Florida Probate Code provides that, with respect to a pour-over devise to an inter vivos trust, the “entire revocation of the trust by an instrument in writing before the testator’s death shall invalidate the devise or bequest.”<sup>332</sup> The Florida Probate Code does not address other methods of revocation for a revocable trust with testamentary aspects. It would be helpful if sections 736.0403 and 736.0606 of the FTC and section 732.513 of

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326. See UNIF. TRUST CODE § 602 cmt. (amended 2005).

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

*Id.*

327. FLA. STAT. § 736.0602(3).

328. FLA. STAT. § 736.0602(3)(a). Under certain circumstances, the settlor may communicate the terms of the trust orally. See FLA. STAT. §§ 736.0103(19), .0407.

329. FLA. STAT. § 736.0602(3)(b).

330. FLA. STAT. § 736.0602(3)(b)2.

331. FLA. STAT. § 736.0403(2)(a)–(b).

332. FLA. STAT. § 732.513(4).

the Florida Probate Code were clarified with respect to the formalities required for amendment<sup>333</sup> and revocation, particularly with respect to whether a revocable trust with land or testamentary aspects may be revoked without a writing, by act, oral communication or other means and, if so, the effect of such revocation on a pour-over devise.<sup>334</sup>

### B. *Provisions for Settlor*

For a revocable trust, the settlor will retain the right to revoke and may retain other rights.<sup>335</sup> These rights include the right to revoke a portion of the trust, to amend the trust, to add more assets to the trust, or to withdraw assets from the trust.<sup>336</sup> In addition, the settlor may retain other powers in a nonfiduciary capacity, such as the power to appoint or remove trustees, the power to control the trustee's administration of the trust, or the power to direct distributions.<sup>337</sup>

The settlor should consider the provisions of the trust that will apply in the event the settlor personally loses the capacity to exercise the power of revocation. If the settlor is a trustee, the settlor should include provisions regarding succession of trustees and who will serve as trustee if the settlor loses the capacity to serve, as well as provisions for the distribution of income and principal, such as for the benefit of the settlor during the settlor's incapacity. Further, the settlor may want to consider the use of a durable power of attorney, granting the attorney-in-fact the power to transfer assets from the settlor's name to the trust, as well as whether to designate a preneed guardian in the event of the settlor's incapacity.<sup>338</sup> In addition, the settlor should consider whether an attorney-in-fact should have the power to amend or revoke the trust and what statutory powers a guardian might have in the

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333. The execution of an amendment to a revocable trust also should require the formalities necessary to make a codicil to a will, which are the same as the requirements to make a will. See FLA. STAT. §§ 732.502, 736.0403(2)(b). Section 736.0103(20) of the *Florida Statutes* defines the term "trust instrument" to include an amendment. Section 736.0403 of the *Florida Statutes* refers to the testamentary aspects of a trust, which include provisions in the original or amended trust instrument; however, the language of section 736.0403 of the *Florida Statutes* is not as clear with respect to amendments as section 736.0601 of the *Florida Statutes*, which addresses "[t]he capacity required to create, amend, revoke, or add property to a revocable trust."

334. See FLA. STAT. § 732.513(4).

335. See, e.g., FLA. STAT. § 689.075.

336. FLA. STAT. § 689.075(1)(a), (c).

337. FLA. STAT. § 689.075(b), (d), (e).

338. See, e.g., FLA. STAT. §§ 709.08, 744.3045.

event the trust is not intended or viewed as a complete, viable alternative to a guardianship.<sup>339</sup>

Some revocable trusts allow the settlor to direct that gifts be made from the trust.<sup>340</sup> Occasionally, a revocable trust also grants the trustee the power to make distributions during the settlor's lifetime to beneficiaries other than the settlor.

### C. *Provisions During Probate of Settlor's Estate*

Many clients have heard that revocable trusts can be used to avoid probate. In general, the probate process involves: 1) finding and collecting the assets owned by the decedent—marshalling the assets; 2) determining and paying the claims against the estate—the claims process—and any estate taxes, as well as paying the expenses of administering the estate; and 3) determining the beneficiaries of the estate and distributing the assets to the beneficiaries.

Technically, assets in a revocable trust are not subject to probate in that they do not pass by will or intestacy, and they are not included in the inventory of the probate estate.<sup>341</sup> However, assets in a revocable trust may be required to be paid to the personal representative of the settlor's probate estate to pay the claims and expenses of administering the settlor's probate estate.<sup>342</sup> Further, assets in the revocable trust may be required to pay estate taxes under state or federal law.<sup>343</sup> In addition, the trustee is required to file a Notice of Trust with the court, providing certain information about the trust and the settlor; however, failure to file the notice does not relieve the trustee of its financial obligation to the estate.<sup>344</sup> Thus, some of the process and obligations associated with probate impact the revocable trust and who will ultimately receive the trust assets. In addition, the probate process affects when trust distributions can be made, and the trustee should not distribute assets from the revocable trust until the probate is completed or the trustee is clear of liability for the estate's obligations, administration expenses, and taxes.

Creating a revocable trust involves the funding of a trust—determining which assets are to be transferred to the revocable trust during the settlor's

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339. See FLA. STAT. § 736.0602(5)–(6). See also FLA. STAT. §§ 744.441, .444.

340. For years in which there is a federal estate tax, see I.R.C. §§ 2036(a)(2), 2035(e).

341. See, e.g., FLA. STAT. §§ 731.201(14), 733.604(1), .607(1).

342. FLA. STAT. §§ 733.607(2), .707(3), 736.05053(1).

343. For years in which there is a Florida or federal estate tax, see FLA. STAT. § 733.817(5)(b), (c), (d).

344. FLA. STAT. § 736.05055(1), (2), (7).

lifetime and effectuating those transfers during the settlor's lifetime.<sup>345</sup> This process is similar to one of the first steps of probate—marshalling the probate assets. Thus, creating a revocable trust accelerates this process, requiring the settlor to “marshall” the assets to be transferred to the trust and to comply with the formalities required to transfer the assets. This process requires the time and effort of the settlor, as well as time expended by the settlor's attorney to make these transfers. The settlor can, however, participate in the process and reduce the attorney's time needed in this process. Transferring assets to a trust during lifetime avoids the need for these assets to be collected by the personal representative and inventoried as a probate asset; however, it requires the settlor and the trustee to do similar acts under trust law.<sup>346</sup> The settlor must transfer the assets during his or her lifetime to the trustee, and the trustee, upon the settlor's death, must account to the beneficiaries of the trust with respect to these assets.<sup>347</sup>

The creation of a revocable trust does not avoid the need for probate for purposes of the claims process.<sup>348</sup> The claims process provides a nonclaim period after which claims will be barred—generally three months after a notice to creditors is filed or thirty days after actual notice to a creditor is given, whichever is later—with a maximum two year period of limitation.<sup>349</sup> If there is no probate, the nonclaim period does not begin to run, but the two year period of limitation applies.<sup>350</sup> Thus, probate may limit the exposure of the trustee and accelerate the time period for distribution of the trust assets. Further, the Florida Probate Code and the FTC provide rules whereby the trustee is required to contribute trust assets to the probate estate if the residuary estate is insufficient to pay the estate's claims and expenses.<sup>351</sup> In addition, the Florida Probate Code and the FTC contain provisions for the abatement of devises as well as the “abatement” of trust distributions to pay these amounts.<sup>352</sup> In general, the provisions of the will and trust are treated as one document for this purpose so that a specific devise of property, under the will and a provision in the trust for a distribution of a specific asset, would be the last to be sold to pay for the estate's claims and expenses.<sup>353</sup> The Florida

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345. See FLA. STAT. § 736.0401(1), (2).

346. See FLA. STAT. §§ 736.0401, .0810.

347. See FLA. STAT. §§ 736.08013, 738.08135.

348. See, e.g., FLA. STAT. §§ 733.701 – 705.

349. FLA. STAT. §§ 733.702(1), 710; see *May v. Ill. Nat'l Ins. Co.*, 771 So. 2d 1143, 1150 (Fla. 2000).

350. See FLA. STAT. § 733.710.

351. See FLA. STAT. §§ 733.607(2), .707(3), .805, 736.05053. In addition, the trust may have expenses for administering the trust. FLA. STAT. § 736.05053(4)

352. See FLA. STAT. §§ 733.707, .805.

353. See *id.*



Probate Code should be amended to clarify whether the residuary estate must be exhausted before contributions from the trust are required, or whether the residuary estate and the residuary dispositions are considered as one residuary for purposes of abatement and contribution.<sup>354</sup> Further, after the settlor's death, the trust assets will either be required to be: 1) distributed outright to the trust beneficiaries; 2) held in trust for the trust beneficiaries; or 3) paid to the settlor's estate and distributed by the settlor's will (or intestacy). If the assets are to be distributed outright, then the trust is a substitute for outright devises in the will. If the assets are to be held in trust after the settlor's death, then the trust is a substitute for a testamentary trust. If the assets are to be paid to the settlor's estate, then the trust is not a substitute for any provisions of a will. Thus, a revocable trust can be used to avoid some of the probate process; however, to the extent it does, it generally substitutes a trust process for the probate process.

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354. See FLA. STAT. §§ 733.607(2), .805(4); FLA. STAT. 736.05053(2)(a). Does the right of contribution under section 733.607(2) apply only if the probate residuary estate is insufficient, or does section 733.805 apply first to treat the residuary estate and the residue of the trust as one? This would be important if the residuary beneficiaries of the will and trust are different—i.e., the residuary does not pour over into the trust. There is a disconnect between the trustee's obligation to contribute, which is conditioned on the insufficiency of the probate residuary estate, and the order of abatement, which is determined as if the will and trust were one common document. Consider the example where the probate residuary estate is \$400,000, the trust residue is \$600,000, and the expenses of administration and claims are \$200,000. Under sections 733.606(2) and 733.707(3) of the *Florida Statutes*, the probate residuary estate is sufficient to pay the \$200,000; thus, the trustee has no obligation to pay probate expenses and obligations; however, under section 733.805(4) of the *Florida Statutes*, the will and trust are to be treated as one document, with the devises and trust distributions abating in the statutory order in sections 733.805 and 736.05053 of the *Florida Statutes*. If the will and trust have different beneficiaries, the probate residuary would abate to pay \$80,000 (40% of the \$200,000) and the trust residue would abate to pay \$120,000 (60% of the \$200,000). The trustee should be obligated to contribute to the estate the abated portion of the trust residue; however, that obligation only arises if the residuary of the probate estate is insufficient. This issue also could be important if (1) the residuary estate pours over into the trust, (2) the probate residuary estate is not liquid but the trust residue is liquid, and (3) the trustee is not required to contribute the liquid assets because the probate residuary is sufficient. Thus, the trustee's obligation to contribute should be tied to the abatement rules rather than conditioned on the insufficiency of the probate residuary. Another issue is whether the will and trust should be considered one document for other purposes, such as for satisfying general devises and general trust distributions from general probate and trust assets.

See Florida House Bill 361 and Florida Senate Bill 998 for some proposed amendments to *Florida Statutes*, sections 733.607(2), 733.707(3), and 736.05053 (adding subsection 5). Fla. CS for SB 998 (2010); Fla. CS for HB 361 (2010) (bills have identical provisions except that SB 998 also contains new section 736.04114 regarding judicial construction of language relating to the repealed federal estate tax). See also Fla. S. Comm. on Banking & Ins., CS for SB 998 (2010) Staff Analysis (Mar. 5, 2010), available at <http://www.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s0998.bi.pdf>.

If the settlor dies in a year in which there is a federal estate tax, then the trust assets will be included in the settlor's gross estate for federal estate tax purposes.<sup>355</sup> Thus, a revocable trust will not avoid the federal estate tax; however, a revocable trust can be used to minimize or eliminate estate taxes in the same way that a will can be used. For example, a revocable trust can provide for distributions to or for a spouse, or for distributions to a charity or for a charitable purpose, and qualify for the marital or charitable deduction.<sup>356</sup> Similarly, a revocable trust can contain provisions that take advantage of the unified credit—the applicable exclusion amount—and reduce estate taxes when the second spouse dies.<sup>357</sup> If the settlor dies in a year in which there is no federal estate tax but the carryover basis rules apply, assets held in a revocable trust could qualify for the \$1,300,000 basis increase.<sup>358</sup> Further a revocable trust could be drafted to qualify for the additional \$3,000,000 spousal property basis increase.<sup>359</sup>

The Florida Probate Code and the FTC contain provisions for the reasonable compensation of the attorneys, with respect to the administration of the estate and the revocable trust, with the attorney's fees for the trust being seventy-five percent of the attorney's fees for the estate.<sup>360</sup> Thus, a revocable trust can be used to try to limit the estate's attorney's fees; however, whether this results in a savings depends in part on the attorney's fees and costs to create and fund the revocable trust and whether the estate or trust has additional fees that are considered reasonable for "extraordinary services."<sup>361</sup> In addition, the fees of the personal representative as well as the fees of the trustee need to be considered to see if there is an overall savings. Also, there may be intangibles to consider, including whether the settlor will be burdened by the formalities of trust ownership.

#### D. *Provisions for Distribution of Assets after Settlor's Death*

When drafting the provisions for distribution of the trust assets after the settlor's death, the drafter needs to consider the default rules applicable to wills and whether there are similar default provisions for a trust. For example, if the will provides for a devise of a specific asset when the settlor dies,

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355. See I.R.C. §§ 2036(a), 2038(a)(1).

356. See generally I.R.C. §§ 2056, 2055.

357. See I.R.C. § 2010.

358. See generally I.R.C. § 1022, including § 1022(b) for the general basis increase.

359. See generally I.R.C. § 1022, including § 1022(c) for qualified spousal property and QTIP (qualified terminable interest property).

360. FLA. STAT. §§ 733.6171, 736.1007(2).

361. See FLA. STAT. §§ 733.6171(3), 736.1007(5).

there are will statutes that address ademption and nonademption of the devise as well as a provision for whether the devise is to be subject to any liability secured by the devised assets.<sup>362</sup> The FTC contains comparable provisions for only some of these issues as exemplified in Appendix A. Further, if a will contained a general devise, there is a will statute addressing ademption by satisfaction and whether the devise will be reduced by gifts made during lifetime.<sup>363</sup> By contrast, the FTC does not contain a provision regarding satisfaction.<sup>364</sup> The FTC contains a new provision authorizing judicial reformation for mistakes of fact or law to conform a trust to the settlor's intent.<sup>365</sup> By contrast, an ambiguous provision of a will may be judicially construed or a will may be revoked by mistake in the execution; however, a will will not be reformed to correct mistakes or effectuate intent.<sup>366</sup> When drafting trust provisions similar to will provisions, care must be taken to provide for these situations and not to assume that the same will default rules apply to all trust distributions.

## V. CONCLUSION

Revocable trusts are a special type of inter vivos trust under Florida law that are appropriate for some clients and some assets. They can be used to marshal an individual's assets during lifetime, to provide for the contingency of incapacity during lifetime, to preserve some privacy, and to provide for the disposition of assets on death. Revocable trusts can be used to complement a will and to provide parallel administration upon death. A revocable trust can be used as one of the estate planning documents for a client, but it is not a panacea for all clients or a substitute for probate. It should be used in conjunction with a will and can be used with other estate planning documents, such as a durable power of attorney and advanced directives. A revocable trust can be used to streamline some of the aspects of probate and as part of a plan to minimize or eliminate estate taxes or take advantage of income tax basis increases. A revocable trust should be personalized for each client and should not be used for every client or for all assets.

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362. See, e.g., FLA. STAT. §§ 732.605–.606; FLA. STAT. § 733.803.

363. See, e.g., FLA. STAT. § 732.609. If a will contains a general devise, the testator and settlor should provide whether the trustee will be required to use trust assets to pay the general devises to the extent the general probate assets are insufficient.

364. See FLA. STAT. § 736.1107.

365. FLA. STAT. § 736.0415. See also FLA. STAT. § 689.225(4) (judicial reformation under statutory rule against perpetuities); *id.* § 736.0413 (application of *cy pres* doctrine for charitable trusts).

366. See FLA. STAT. § 732.5165.

## APPENDIX A

*Comparison of Selected Wills and Trust Statutes*

	Wills and Estates	Trusts
Abatement	FLA. STAT. § 733.805 FLA. STAT. § 733.607(2) FLA. STAT. § 733.707(3)	FLA. STAT. § 733.805 FLA. STAT. § 733.607(2) FLA. STAT. § 733.707(3) FLA. STAT. § 736.05053 FLA. STAT. § 736.0105(2)(m)
Accessions, Ademption and Non-Ademption (Securities)	FLA. STAT. § 732.605	FLA. STAT. § 736.1107
Ademption by Satisfaction	FLA. STAT. § 732.609	
Ademption by Extinction Non-Ademption	FLA. STAT. § 732.606	
Antilapse, Lapse	FLA. STAT. § 732.603 FLA. STAT. § 732.604	FLA. STAT. § 736.1106
Agreements among Beneficiaries	FLA. STAT. § 733.815	FLA. STAT. § 736.0412 FLA. STAT. § 736.0105(2)(k) FLA. STAT. § 736.0111
Agreement Regarding Wills and Devises, Joint Wills	FLA. STAT. § 732.701	
Bond	FLA. STAT. § 733.402	FLA. STAT. § 736.0702
Contests after Death	FLA. STAT. § 732.518	FLA. STAT. § 736.0207
Dissolution of Marriage	FLA. STAT. § 732.507	FLA. STAT. § 736.1105
Distributions in Kind	FLA. STAT. § 733.810	FLA. STAT. § 733.810(2) FLA. STAT. § 736.0816(22)
Encumbered Property (Exoneration)	FLA. STAT. § 733.803	
Exculpation of Fiduciary	FLA. STAT. § 733.710	FLA. STAT. § 736.1011
Exempt property	FLA. STAT. § 732.402	FLA. STAT. § 733.707(3)(d)
Generic Terms	FLA. STAT. § 732.608	FLA. STAT. § 736.1102
Homestead	FLA. CONST. art. X, § 4 FLA. STAT. § 732.401 FLA. STAT. § 732.4015 FLA. STAT. § 731.201(32)	FLA. CONST. art. X, § 4 FLA. STAT. § 732.401 FLA. STAT. § 732.4015

	Wills and Estates	Trusts
Improper Distribution	FLA. STAT. § 733.812	FLA. STAT. § 736.1018
Intent	FLA. STAT. § 732.6005(1)	FLA. STAT. § 736.1101 FLA. STAT. § 736.0105(2)
Killer	FLA. STAT. § 732.802	FLA. STAT. § 736.1104
Limitations on Claims or Actions	FLA. STAT. § 733.701 FLA. STAT. § 733.710	FLA. STAT. § 736.1014 FLA. STAT. § 733.710
List of Personal Property	FLA. STAT. § 732.515	
Penalty Clause for Contest (In Terrorem Clause)	FLA. STAT. § 732.518	FLA. STAT. § 736.1108 FLA. STAT. § 736.0105(2)(w)
Per Stirpes	FLA. STAT. § 732.611	FLA. STAT. § 736.1103
Fiduciary Powers Power to Sell Real Estate	FLA. STAT. § 733.612 FLA. STAT. § 733.6121 FLA. STAT. § 733.613	FLA. STAT. § 736.0816 FLA. STAT. § 736.0816(2) FLA. STAT. § 736.08163
Power of Appointment	FLA. STAT. § 732.607	
Simultaneous Death	FLA. STAT. § 732.601(1), (2)	FLA. STAT. § 732.601(1), (2)
Tax Apportionment	FLA. STAT. § 733.817(b)1	FLA. STAT. § 733.817(b)2
Undue Influence; Fraud; Duress; Mistake; Effect of Probate	FLA. STAT. § 732.5165 FLA. STAT. § 733.103(2)	FLA. STAT. § 736.0406
Undue Influence; Burden of Proof; Presumption	FLA. STAT. § 733.107 FLA. STAT. § 90.301 FLA. STAT. § 90.302 FLA. STAT. § 90.303 FLA. STAT. § 90.304	
Vesting; Future Interests	FLA. STAT. § 732.514	FLA. STAT. § 736.1106(2)

## 2008–2009 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

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## I. INTRODUCTION

This survey does not deal with every case decided in the past twelve months that might be said to be of interest to business owners, their advisors, and others who follow business law developments. Cases of first impression, decisions involving or identifying conflicts between the Florida District Courts of Appeal, and questions certified to the Supreme Court of Florida as being of great public importance are included. Cases that clarify or expand upon existing principles of law are also included. This year's survey also takes a look at a number of cases that, while procedural in nature, contain concise analyses of some equitable principles and some unusual or not often relied upon legal theories.

Many of these decisions address several areas of law. To the extent possible, cases have been placed in the category that plays the most prominent role in the court's discussion or decision.

## II. ALTERNATIVE DISPUTE RESOLUTION

As usual, there were many arbitration cases decided over the course of the last year. Summaries of some of the more significant ones follow.

A. *Arbitration: Forum Selection Clause*

After litigation had been instituted in Florida, the defendant asked the trial court to compel arbitration in accordance with the consulting agreement between the defendant and the plaintiff, which "provided for arbitration in Arizona."<sup>1</sup> The trial court so ordered, but its order required that the arbitration be held in Florida instead of Arizona.<sup>2</sup> The defendant appealed the part of the trial court's ruling that ordered that the arbitration take place in Florida.<sup>3</sup> The Fourth District Court of Appeal held that under the Federal Arbitration Act, which was the applicable law in this case, it was not proper for the trial judge to unilaterally modify part of the arbitration provision.<sup>4</sup> The ap-

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1. *Remington Fin. Group, Inc. v. Anchors Aweigh Marine, Inc.*, 12 So. 3d 1264, 1265 (Fla. 4th Dist. Ct. App. 2009).

2. *Id.*

3. *Id.*

4. *Id.* The appellate court noted that the plaintiff had "not move[d] to strike the venue provision," but the court did not discuss what impact, if any, such a motion by the plaintiff might have had on the outcome of the appeal under the Federal Arbitration Act. *Id.*; see 9 U.S.C. §§ 1-16 (2006).



pellate court relied on its decision in *BDO Seidman, LLP v. Bee*,<sup>5</sup> where it held that if an arbitration clause is “not unconscionable as a whole,” it must be enforced as written.<sup>6</sup>

### B. *Arbitration Agreement Enforced*

Dorothy Stern (Resident) executed an arbitration agreement with Life Care Center of New Port Richey (Life Care) upon her admission.<sup>7</sup> The arbitration clause directed that the arbitrator be the American Arbitration Association (AAA) and the applicable AAA rules be used in any arbitration between the parties.<sup>8</sup> Resident sued Life Care, and Life Care asked the trial court to order arbitration.<sup>9</sup> It seems, however, that more than five years before the lawsuit—and several years before the arbitration agreement was executed—AAA had announced that it would no longer arbitrate nursing home disputes unless the parties agreed to AAA arbitration after the dispute arose.<sup>10</sup> The parties had not so agreed.<sup>11</sup> Resident argued that AAA’s policy left the parties with no valid and enforceable agreement to arbitrate, and the trial court agreed.<sup>12</sup> Life Care appealed, and the Second District Court of Appeal reversed.<sup>13</sup> Under the circumstances presented, section 682.04 of the *Florida Statutes* required that the trial court appoint an arbitrator.<sup>14</sup>

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5. 970 So. 2d 869 (Fla. 4th Dist. Ct. App. 2007).

6. *Remington Fin. Group, Inc.*, 12 So. 3d at 1265 (citing *BDO Seidman, LLP v. Bee*, 970 So. 2d 869, 877 (Fla. 4th Dist. Ct. App. 2007)).

7. *New Port Richey Med. Investors, LLC v. Stern*, 14 So. 3d 1084, 1086 (Fla. 2d Dist. Ct. App. 2009).

8. *Id.*

9. *Id.* at 1085–86. Among other claims, Resident alleged that her rights as a resident of a nursing home had been violated. *Id.* at 1085.

10. *See id.* at 1085–86.

11. *See New Port Richey Med. Investors, LLC*, 14 So. 3d at 1086.

12. *Id.*

13. *Id.* at 1086–87.

14. *Id.* at 1087. The Second District Court of Appeal noted first that neither of the parties had offered any evidence regarding their intent with respect to choosing the AAA, despite Resident’s argument that this was a “material term” of the agreement, and that the trial court could not modify the agreement. *Id.* at 1086. The appellate court then commented that Resident failed to present evidence that the choice of arbitrator was an “integral part of the agreement to arbitrate.” *New Port Richey Med. Investors, LLC*, 14 So. 3d at 1087. It is not clear, however, that the result would have been different even if Resident had presented such evidence, in light of the appellate court’s statement immediately thereafter that “[w]e also observe that the parties’ arbitration agreement contains a severability clause.” *Id.*

### C. Arbitration: Waiver of Right by Conduct

In the next two arbitration cases, the courts were asked to determine if participation in litigation resulted in a waiver of a party's right to arbitrate.<sup>15</sup> In *Green Tree Servicing, LLC v. McLeod*, Mr. McLeod bought a home and entered into a Manufactured Home Retail Installment Contract and Security Agreement, to which Green Tree Servicing, LLC (Green Tree) subsequently became a party.<sup>16</sup> The agreement contained a binding arbitration clause.<sup>17</sup> Mr. McLeod died, and Ms. McLeod (Personal Representative), the surviving spouse of Mr. McLeod, in her capacity as personal representative of the estate of McLeod, became the plaintiff in a pending action that Mr. McLeod had instituted against Green Tree.<sup>18</sup> The complaint alleged that Green Tree had violated the Florida Consumer Collection Practices Act,<sup>19</sup> and after Mr. McLeod's death, Ms. McLeod added a wrongful death claim in what then became the second amended complaint.<sup>20</sup> Green Tree, which had previously sought an order to compel arbitration, renewed its motion to compel arbitration.<sup>21</sup> Personal Representative then sought discovery in the lawsuit, and Green Tree moved for protective orders with respect to discovery.<sup>22</sup> After much delay in the proceedings, the trial court ruled that Personal Representative could have ninety additional days of "arbitration related discovery."<sup>23</sup> Before the trial court ruled, however, counsel for both parties stipulated that discovery beyond that related to arbitration, more specifically, discovery going to the merits of the litigation, would constitute a waiver of Green Tree's claim to arbitration.<sup>24</sup> Green Tree then hired new counsel who promptly made multiple discovery requests that went to the merits of the action.<sup>25</sup> New counsel subsequently moved to compel that discovery and set a hearing on its motion.<sup>26</sup> However, Green Tree withdrew its requests for discovery and its motion to compel, and it cancelled the scheduled hearing

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15. See *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682 (Fla. 2d Dist. Ct. App. 2009); *DFC Homes of Fla. v. Lawrence*, 8 So. 3d 1281 (Fla. 4th Dist. Ct. App. 2009).

16. *Green Tree Servicing, LLC*, 15 So. 3d at 684.

17. *Id.*

18. *Id.*

19. *Id.*; see FLA. STAT. § 559.55 (2009).

20. *Green Tree Servicing, LLC*, 15 So. 3d at 684.

21. *Id.*

22. *Id.* at 685.

23. *Id.*

24. *Id.*

25. *Green Tree Servicing, LLC*, 15 So. 3d at 685.

26. *Id.*

on the discovery motion.<sup>27</sup> When Green Tree's motion to compel arbitration finally was heard, the trial court ruled that Green Tree had waived arbitration because of the merits-related discovery.<sup>28</sup> The Second District Court of Appeal affirmed the trial court, aligning itself with decisions of the Third and Fifth District Courts of Appeal.<sup>29</sup> In order to do so, however, the court concluded that it was necessary to "recede from" its decision in *Merrill Lynch Pierce Fenner & Smith, Inc. v. Adams*<sup>30</sup> "to the extent that it is inconsistent with the rule that we now adopt."<sup>31</sup> In *Merrill Lynch*, the court had ruled that participation in discovery by the party seeking to compel arbitration did not constitute a waiver.<sup>32</sup> The Second District Court of Appeal in *Green Tree* held:

[W]e now hold that a party's participation in discovery related to the merits of pending litigation is activity that is generally inconsistent with arbitration. Such activity—considered under the totality of the circumstances—will generally be sufficient to support a finding of a waiver of a party's right to arbitration.<sup>33</sup>

Even where a party has filed a timely motion to compel arbitration, the party can waive any right to arbitration that the party has because of actions that are inconsistent with the request for arbitration.<sup>34</sup> And once waived, the

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27. *Id.*

28. *Id.* at 686.

29. *Id.* at 688. (citing *Olson Elec. Co. v. Winter Park Redevelopment Agency*, 987 So. 2d 178, 179 (Fla. 5th Dist. Ct. App. 2008); *Estate of Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.*, 971 So. 2d 811, 812–13 (Fla. 3d Dist. Ct. App. 2007); *Coastal Sys. Dev., Inc. v. Bunnell Found., Inc.*, 963 So. 2d 722, 724 (Fla. 3d Dist. Ct. App. 2007)). The Second District Court of Appeal, after reviewing cases decided by the First and Fourth Districts, concluded that those courts have not ruled on whether engaging in merits-related discovery, in and of itself, without other conduct inconsistent with arbitration, is insufficient to waive arbitration. *Green Tree Servicing, LLC*, 15 So. 3d at 688. The Second District also noted that in one of its post *Merrill Lynch* opinions the court found a waiver of the right to arbitrate and held, without referring to *Merrill Lynch*, that engaging in discovery was one of the factors that led the court to find that there had been a waiver of the party's claim for arbitration. *Id.* at 693 (citing *Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So. 2d 32, 33 (Fla. 2d Dist. Ct. App. 2005); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Adams*, 791 So. 2d 25 (Fla. 2d Dist. App. 2001)).

30. 791 So. 2d 25 (Fla. 2d Dist. Ct. App. 2001).

31. *Green Tree Servicing, LLC*, 15 So. 3d at 694.

32. *Merrill Lynch*, 791 So. 2d at 26. The appellate court rejected the alternative of distinguishing the case before it from the facts in *Merrill Lynch*. See *Green Tree Servicing, LLC*, 15 So. 3d at 690.

33. *Green Tree Servicing, LLC*, 15 So. 3d at 694.

34. *Id.* at 687 (citing *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 681 (Fla. 1973)).

right to arbitration cannot be revived without the opposing party's consent.<sup>35</sup> Propounding discovery on the merits of the case results in a waiver of arbitration.<sup>36</sup> Green Tree's change of heart did not undo the actions previously taken that were inconsistent with its claim that arbitration was required.<sup>37</sup> Finally, the Second District Court of Appeal considered whether the disavowal of its *Merrill Lynch* decision was unfair to Green Tree and should have prospective application only.<sup>38</sup> The court decided that there was no unfairness because of Green Tree's earlier stipulation regarding discovery.<sup>39</sup>

In the second waiver of arbitration by conduct case, the Fourth District Court of Appeal, in *DFC Homes of Florida v. Lawrence*,<sup>40</sup> found that the participation in litigation was limited and did not constitute a waiver of a party's right to compel arbitration.<sup>41</sup> The contract between DFC Homes of Florida (DFC) and Lawrence contained an arbitration provision, and when a dispute arose between them, it was arbitrated.<sup>42</sup> The arbitrator found in DFC's favor.<sup>43</sup> Lawrence then filed an action against DFC in the circuit court.<sup>44</sup> In response, DFC filed a motion to compel further arbitration.<sup>45</sup> The trial court denied the motion observing that nothing required a second arbitration.<sup>46</sup> The appellate court noted that Lawrence had claimed that by proceeding in the court system and making settlement offers DFC had waived its right to arbitrate.<sup>47</sup> The Fourth District Court of Appeal stated the general rule that a party waives the contractual "right to arbitration by active participation . . . before asserting that right."<sup>48</sup> However, to prove waiver, Lawrence had to show that DFC had knowledge of the right to arbitrate but nevertheless actively participated in litigation or took other action inconsistent with arbitration.<sup>49</sup> Under the facts of *DFC Homes*, any of the alleged impro-

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35. *Id.* (citing *Williams v. Manor Care of Dunedin, Inc.*, 923 So. 2d 615, 617 (Fla. 2d Dist. Ct. App. 2006)).

36. *Id.* at 688.

37. *See id.* at 690.

38. *See Green Tree Servicing, LLC*, 15 So. 3d at 694–95.

39. *Id.*

40. 8 So. 3d 1281 (Fla. 4th Dist. Ct. App. 2009).

41. *Id.* at 1283–84.

42. *Id.* at 1282.

43. *Id.*

44. *Id.*

45. *DFC Homes*, 8 So. 3d at 1282.

46. *Id.*

47. *See id.* at 1283.

48. *Id.* (citing *Strominger v. AmSouth Bank*, 991 So. 2d 1030, 1034 (Fla. 2d Dist. Ct. App. 2008)).

49. *See id.* (citing *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th Dist. Ct. App. 2003)).

per participation took place after the arbitrator had rendered his decision against Lawrence.<sup>50</sup> It was then that Lawrence instituted the action against DFC.<sup>51</sup> Lawrence alleged that DFC “actively engaged” in the action by participating in depositions, making settlement offers, filing a motion to dismiss the suit for lack of prosecution, answering interrogatories, and participating in mediation.<sup>52</sup> The appellate court disagreed.<sup>53</sup> DFC’s participation in the litigation was limited and took place only after it had exercised its right to arbitrate.<sup>54</sup> It did not even file an answer or an affirmative defense to Lawrence’s complaint.<sup>55</sup> Attempting to settle a dispute cannot be characterized as other action inconsistent with the right to arbitrate.<sup>56</sup> The appellate court reversed the trial court’s denial of DFC’s motion to compel arbitration.<sup>57</sup>

#### D. *Arbitration and Discharge of Contractor’s Claim of Lien*

*Brookshire v. GP Construction of Palm Beach, Inc.*<sup>58</sup> involved the enforcement of a statutory construction lien in the face of a binding arbitration clause in the parties’ agreement.<sup>59</sup> GP Construction of Palm Beach, Inc. (Contractor) recorded a lien on the real estate owned by the Brookshires (Owners).<sup>60</sup> Owners, pursuant to section 713.21(4) of the *Florida Statutes*, filed a complaint seeking to have the lien discharged.<sup>61</sup> The clerk of the court issued a summons to Contractor at which point Contractor had “to show cause within 20 days why [its] lien should not be enforced by action or vacated and canceled.”<sup>62</sup> Contractor filed a motion to compel arbitration under its agreement with Owners and set the motion for hearing, but it did not start an action to enforce the lien.<sup>63</sup> On appeal, Contractor said that it filed the motion to compel arbitration rather than starting an action during the twenty-day period so that there would not be any claim that it had waived its right to arbitration.<sup>64</sup> The trial court granted Contractor’s motion to com-

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50. *DFC Homes*, 8 So. 3d at 1283.

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.*

55. *DFC Homes*, 8 So. 3d at 1283.

56. *Id.*

57. *Id.* at 1284.

58. 993 So. 2d 179 (Fla. 4th Dist. Ct. App. 2008).

59. *See id.* at 179–80.

60. *Id.*

61. *Id.* at 180.

62. *Id.*

63. *Brookshire*, 993 So. 2d at 180.

64. *See id.*

pel arbitration and did not discharge the lien.<sup>65</sup> The Fourth District Court of Appeal reversed, directing that the lien be discharged by the trial court.<sup>66</sup> The statutory twenty-day response period does not provide for extensions or other exceptions, and there is no discretion left to the courts.<sup>67</sup> If the lienor fails to take the statutorily required action within the required time, the court must discharge the lien.<sup>68</sup> Had Contractor filed a counterclaim to Owners' complaint during the statutory period, the lien could have been preserved.<sup>69</sup> The appellate court noted that "[t]he lien, however, and the dispute, are not one and the same, [and] disposition of the lien would not" have resolved the issue of liability on Contractor's claim.<sup>70</sup>

Although the decision represents an interpretation of a party's obligation under one statutory lien statute, the strict rule enunciated here may be more far reaching than it appears. Will the principles set out here apply equally to other situations where judicial action may be the statutory mandate for enforcing a party's right or defending against the statutory right but the parties have agreed to arbitrate all disputes? The Fourth District Court of Appeal's ruling in this case and the cases cited therein should be carefully considered.<sup>71</sup>

Unlike the situation in *Brookshire*, where apparently there was no applicable exception to arbitration contained in the arbitration agreement,<sup>72</sup> in *Greenberg v. Sellers*<sup>73</sup> there was an exception.<sup>74</sup> The arbitration clause of the operating agreement between the parties provided in part that "the aggrieved party shall be entitled to injunctive and/or equitable relief in a court of competent jurisdiction" notwithstanding the mandatory arbitration provision.<sup>75</sup>

65. *Id.*

66. *Id.*

67. *Id.* (citing *Sturge v. LCS Dev. Corp.*, 643 So. 2d 53, 55 (Fla. 3d Dist. Ct. App. 1994)).

68. *Brookshire*, 993 So. 2d at 180 (citing *Sturge v. LCS Dev. Corp.*, 643 So. 2d 53, 55 (Fla. 3d Dist. Ct. App. 1994)).

69. *See id.* (citing *Mainlands Constr. Co. v. Wen-Dic Constr. Co.*, 482 So. 2d 1369, 1370 (Fla. 1986)).

70. *Id.*

71. In *Brookshire*, Contractor took the position that its underlying claim for payment would have to be arbitrated. *Id.* However, had that not been the case, could Contractor, if it had chosen to do so, have successfully alleged that the Brookshires waived their right to arbitration by seeking relief from the court under section 713.21(4) of the *Florida Statutes*? Appropriate language in an arbitration agreement may eliminate some of the waiver concerns presented in *Brookshire*.

72. *See id.*

73. 2 So. 3d 381 (Fla. 4th Dist. Ct. App. 2008).

74. *See id.* at 383.

75. *Id.* at 382 (emphasis added).

The Fourth District Court of Appeal agreed with the trial court that four out of the five counts of the complaint were subject to arbitration.<sup>76</sup> These counts were for conversion, breach of contract and of fiduciary duty, and violations under the Florida Deceptive and Unfair Trade Practices Act.<sup>77</sup> However, the appellate court reversed with respect to the first count, which was for an accounting, since that was a request for equitable relief.<sup>78</sup>

#### E. *Enforcement of Settlement Agreement*

Disputes arose in connection with gas station leases between Petroleum Realty I, LLC (Landlord) and Boca Petroco, Inc. (Tenant).<sup>79</sup> Landlord sued for payment of rent and certain other amounts.<sup>80</sup> The oral settlement reached just before trial addressed these issues, plus it required Tenant to file periodic environmental reports with Landlord in accordance with the requirements of the leases.<sup>81</sup> Tenant failed to make required payments in accordance with the settlement agreement.<sup>82</sup> Additional litigation ensued that included the following: the trial court enforced the settlement agreement; Tenant appealed; the Fourth District Court of Appeal affirmed; Landlord obtained a writ of possession with the trial court retaining jurisdiction to enforce the settlement agreement; Tenant again appealed; and the Fourth District Court of Appeal again affirmed.<sup>83</sup> Although the lease had expired prior to the appellate court's second decision, and Tenant had been ordered to pay more than \$14,000,000 in damages for failure to pay the amounts due in accordance with the settlement agreement, the matter did not end after the second trip to the appellate court.<sup>84</sup> Landlord subsequently sent notice to Tenant that Tenant was in default under the environmental provisions of the lease, and based on provisions in the lease that imposed on Tenant the obligation to undertake environmental clean-up efforts, and the alleged failure to file reports under the settlement agreement, Landlord asked the trial court to exercise its continuing enforcement jurisdiction, which the court did, awarding

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76. *Id.* at 382–83.

77. *Id.* Presumably, only damages were sought on these claims.

78. *Greenberg*, 2 So. 3d at 383.

79. *Boca Petroco, Inc. v. Petroleum Realty I, LLC*, 993 So. 2d 1092, 1093 (Fla. 4th Dist. Ct. App. 2008).

80. *Id.*

81. *Id.* at 1094.

82. *Id.*

83. *Id.* at 1093.

84. *Boca Petroco, Inc.*, 993 So. 2d at 1093.

Landlord an additional \$1,901,000 as the environment clean-up cost.<sup>85</sup> Tenant again appealed, and the appellate court reversed as to the environmental clean-up damages.<sup>86</sup> The environmental report requirement was part of the settlement agreement,<sup>87</sup> but the award of clean-up damages was not.<sup>88</sup> Those damages resulted from the alleged breach of the original lease agreement.<sup>89</sup> The clean-up damage award was not an enforcement of the settlement agreement.<sup>90</sup> Therefore, the trial court did not have jurisdiction, and Landlord would have to file another lawsuit to claim clean-up damages.<sup>91</sup>

### III. ATTORNEYS' FEES

#### A. *Prevailing Party: Construction Lien*

In *Trytek v. Gale Industries, Inc.*,<sup>92</sup> the Supreme Court of Florida was called upon to determine what “prevailing party” means in construction lien litigation.<sup>93</sup> Gale Industries, Inc. (Gale) was hired by the Tryteks to install insulation in the home they were building.<sup>94</sup> There was no dispute that during the insulation installation by employees of Gale, the electrical system was inadvertently damaged.<sup>95</sup> Mr. Trytek and Gale agreed on the electrical company that would make repairs, which was a company owned by Mr. Trytek.<sup>96</sup> After the repairs were made, and the Tryteks had calculated the cost of the repairs at \$11,770, the Tryteks tried to offset that amount against the amount Gale claimed it was owed for its work.<sup>97</sup> Gale refused a check tendered by Mr. Trytek in the amount of \$736, which represented the net

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85. *Id.* at 1094. This environment clean-up damage award was then included in a final judgment for unpaid rent and other charges due pursuant to the settlement agreement. *Id.* The balance of the trial court’s judgment was affirmed. *Id.* at 1095.

86. *Id.* at 1094. The Fourth District noted that the Supreme Court of Florida, in *Paulucci v. Gen. Dynamics Corp.*, explained that where a settlement agreement is incorporated into a final judgment and jurisdiction is retained to enforce the terms of the settlement agreement, the court can enforce terms included in the settlement agreement “even if the terms are outside the scope of the remedy” that was requested in the complaint. *Boca Petroco, Inc.*, 993 So. 2d at 1094 (quoting *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003)).

87. *Id.*

88. *Id.* at 1095.

89. *Id.* at 1094.

90. *Id.*

91. *Boca Petroco, Inc.*, 993 So. 2d at 1094–95 (citing *Paulucci*, 842 So. 2d at 803).

92. 3 So. 3d 1194 (Fla. 2009).

93. *Id.* at 1196.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Trytek*, 3 So. 3d at 1196–97.



amount the Tryteks determined was due to Gale.<sup>98</sup> Gale then recorded a \$12,725 construction lien—with no offset for any part of the cost of repair.<sup>99</sup> Based on the stipulations of the parties prior to trial, the only issue to be decided by the judge was the amount of the damages Gale owed to the Tryteks.<sup>100</sup> The judge found that the repair damages were \$11,200, and, in accordance with the parties' stipulations, offset this amount against the \$12,725 amount agreed by the parties to be due Gale.<sup>101</sup> The result was a judgment for Gale in the amount of \$1525.<sup>102</sup> Then the parties filed motions under the construction lien statute seeking attorneys' fees as well as costs, each party claiming "prevailing party" status for purposes of section 713.29 of the *Florida Statutes*.<sup>103</sup> The trial court determined that the test set forth by the Supreme Court of Florida in *Prosperi v. Code, Inc.*<sup>104</sup> was applicable.<sup>105</sup> The trial court concluded that under the "significant issue" test of *Prosperi*, the Tryteks had to be the prevailing party because the only "significant issues," in fact, "the only real issue" was the amount of the Tryteks' recovery on their set-off counterclaim, "and the Tryteks primarily prevailed on their counterclaim."<sup>106</sup> Gale appealed, and the Fifth District Court of Appeal reversed, concluding that the *Prosperi* "significant issues" determination is only applicable if a "contractor is *unsuccessful*" in its action to foreclose on the lien.<sup>107</sup> The Fifth District Court of Appeal found that Gale was successful since it recovered a net amount of \$1525 against the Tryteks, and therefore Gale was the prevailing party and the *Prosperi* test did not apply.<sup>108</sup> The appellate court reversed and remanded for a determination of the fees and costs for Gale, and certified the question to the Supreme Court of Florida.<sup>109</sup> The Court rephrased the certified question as follows:

Where a lienor obtains a judgment against a property owner in an action to enforce a construction lien brought pursuant to section 713.29, *Florida Statutes* (2005), are trial courts required to apply the "significant issues" test articulated in *Prosperi v. Code, Inc.*,

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98. *Id.*

99. *Id.* at 1197.

100. *Id.*

101. *Id.*

102. *Trytek*, 3 So. 3d at 1197.

103. *Id.*

104. 626 So. 2d 1360 (Fla. 1993).

105. *Trytek*, 3 So. 3d at 1197.

106. *Id.*

107. *Id.* at 1198.

108. *Id.*

109. *Id.* at 1196, 1198.

626 So. 2d 1360 (Fla. 1993), in determining which party, *if any*, is the “prevailing party” for the purpose of awarding attorneys’ fees?<sup>110</sup>

The Court summarized “the main issue” as a question of “what factors enter into a determination of ‘prevailing party’ pursuant to section 713.29.”<sup>111</sup> The Court stated “the specific issue” as:

whether the trial court is vested with discretion, or is even required to consider, which party prevailed on the significant issues; or whether the trial court is bound by an inflexible bright-line rule that a prevailing party must be determined and that the contractor must be considered the prevailing party if it obtains a judgment on its lien in any amount in excess of an asserted set-off or counterclaim.<sup>112</sup>

The Court referred to its decision in *Prosperi* for the proposition that when a trial court is called upon to determine the “prevailing party” in a construction lien litigation, it should look to which party prevailed on the “significant issues” before the court.<sup>113</sup> The Court held that the “significant issues test” applies even if a contractor prevails in its lien action.<sup>114</sup> Just because a contractor obtains a judgment on its lien in excess of a claimed set-off or counterclaim does not automatically make it the prevailing party.<sup>115</sup> Thus, the fact that a contractor obtains a “net judgment” is not necessarily a controlling factor in determining the prevailing party, even though it may be “a significant factor.”<sup>116</sup> The Court remanded the matter to the trial court.<sup>117</sup> However, the Court, relying on its decision in *C.U. Associates, Inc. v. R.B. Grove, Inc.*,<sup>118</sup> made it clear that there does not have to be a prevailing party in a construction lien case.<sup>119</sup> In substance, the Court gave trial judges considerable discretion to determine if there is a prevailing party in section 713.29 cases and, if so, which party prevailed on the significant issue or issues.<sup>120</sup>

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110. *Trytek*, 3 So. 3d at 1196 (alteration in original).

111. *Id.* at 1198.

112. *Id.*

113. *See id.* at 1201.

114. *Id.* at 1202.

115. *Trytek*, 3 So. 3d at 1202.

116. *Id.*

117. *Id.* at 1204.

118. 472 So. 2d 1177 (Fla. 1985).

119. *Trytek*, 3 So. 3d at 1203–04.

120. *See id.* While many issues raised by, and the potential problems identified in, the cases in this survey may be resolved contractually, the issues presented by the Court’s deci-

### B. *Prevailing Party: Breach of Lease Agreement Dispute*

In *Civix Sunrise, GC, LLC v. Sunrise Road Maintenance Ass'n*,<sup>121</sup> Civix Sunrise, GC, LLC (Lessee) bought real estate subject to a ninety-nine year lease made in 1972.<sup>122</sup> The lease required Lessee to operate a golf course on the property.<sup>123</sup> Lessee was to also sell golf or country club memberships to people residing on property adjoining the Civix property.<sup>124</sup> After making the purchase, Civix stopped operating the golf course and announced it was planning to develop the property.<sup>125</sup> Various associations (Associations) representing adjacent property owners successfully sued Lessee and prevented it from developing the property.<sup>126</sup> Specifically, Associations persuaded the trial court to declare “that the lease had not been extinguished by merger and [remained as] an encumbrance on the property.”<sup>127</sup> Associations were the intended beneficiaries of parts of the lease, including that part mandating the operation of a golf course.<sup>128</sup> Associations then asked for attorney’s fees pursuant to paragraph twenty of the lease, which so provided to the prevailing party.<sup>129</sup> The trial court awarded fees to Associations as intended third-party beneficiaries of the lease.<sup>130</sup> The Second District Court of Appeal reversed.<sup>131</sup> An agreement as to attorney’s fees in a contract must be “clear and specific” to be enforceable.<sup>132</sup> Applying this test, the appellate court found that the term “party” in the lease’s fee clause referred only to the signatory parties to the lease.<sup>133</sup> In other words, the Second District Court of Appeal refused to read into the lease that these third-party beneficiaries of a

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sion in *Trytek* do not appear to readily lend themselves to that solution. See Barbara Landau, *2007–2008 Survey of Florida Law Affecting Business Owners*, 33 NOVA L. REV. 81, 98–99 (2008) [hereinafter Landau, *2007–2008 Survey*] for a discussion of the Fourth District Court of Appeal’s decision in *Port-A-Weld, Inc. v. Padula & Wadsworth Constr., Inc.*, 984 So. 2d 564 (Fla. 4th Dist. Ct. App. 2008), where the Fourth District Court of Appeal held that the “significant issue” test set forth by the Supreme Court of Florida in *Prosperi* may not be changed by contract. See *Port-A-Weld, Inc.*, 984 So. 2d at 570.

121. 997 So. 2d 433 (Fla. 2d Dist. Ct. App. 2008).

122. *Id.* at 434.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Civix Sunrise, GC, LLC*, 997 So. 2d at 434.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Civix Sunrise, GC, LLC*, 997 So. 2d. at 435.

132. *Id.* (citing *Sholkoff v. Boca Raton Cmty. Hosp., Inc.*, 693 So. 2d 1114, 1118 (Fla. 4th Dist. Ct. App. 1997)).

133. *Id.*

portion of the lease agreement were also beneficiaries of the attorney's fee clause.<sup>134</sup>

#### IV. BUSINESS ARRANGEMENTS, ENTITIES, AND AGREEMENTS

##### A. Corporations: Special Law

The question presented to the Supreme Court of Florida in *Lawnwood Medical Center, Inc. v. Seeger*,<sup>135</sup> was whether the St. Lucie County Hospital Governance Law (HGL)<sup>136</sup> violated Florida's constitutional prohibition against passing a law that includes the "grant of [a] privilege to a private corporation" by special law or by a "general law of local application."<sup>137</sup> Lawnwood Medical Center, Inc. (Lawnwood), a for-profit corporation, owns Lawnwood Regional Medical Center and Heart Institute in St. Lucie County.<sup>138</sup> In 1993, Lawnwood's medical staff adopted Medical Staff Bylaws (Bylaws).<sup>139</sup> The Bylaws were approved by Lawnwood's Board of Directors.<sup>140</sup> Lawnwood needed to have the Bylaws to remain in good standing with the Joint Commission for the Accreditation of Healthcare Organizations.<sup>141</sup> There was no requirement that the Bylaws contain specific terms.<sup>142</sup>

After the Bylaws were adopted, lawsuits were instituted as the result of disputes that developed between the Lawnwood administration and the medical staff.<sup>143</sup> Lawnwood turned to the legislature for help, which resulted in the 2003 enactment of the HGL.<sup>144</sup> The effect of the new law was to allow Lawnwood's Board to trump virtually every decision made by the medical staff pursuant to the Bylaws.<sup>145</sup> Lawnwood instituted suit to have the HGL declared constitutional, but the trial court found the law to be unconstitutional.<sup>146</sup> The First District Court of Appeal agreed that the law was unconstitu-

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134. *Id.*

135. 990 So. 2d 503 (Fla. 2008).

136. *Id.* at 506.

137. *Id.* at 509 (quoting FLA. CONST. art. III, § 11(a)(12)). Article III, section 11(a) of the Florida Constitution provides that "[t]here shall be no special law or general law of local application pertaining to: . . . (12) private incorporation or grant of privilege to a private corporation." FLA. CONST. art. III, § 11(a)(12).

138. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 506.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 507.

144. *Id.* at 507-08.

145. *See id.* at 508.

146. *Id.*

tional.<sup>147</sup> Lawnwood appealed, and the Supreme Court of Florida concluded that the law was a special law, as it was expressly “intended to affect only those privately operated hospitals located in St. Lucie County.”<sup>148</sup> In this case of first impression, the Court’s decision turned on the meaning of the word “privilege,” as used in article III, section 11(a)(12) of the Florida Constitution, a phrase not previously construed by the Court.<sup>149</sup> The Court cited *City of Plattsmouth v. Nebraska Telephone Co.*,<sup>150</sup> where the Supreme Court of Nebraska defined “special privilege,” as used in its constitution, as “a right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons, to the exclusion of others and in derogation of common right.”<sup>151</sup> The Supreme Court of Florida, applying principles of statutory construction, concluded that “privilege” is not limited to an economic advantage and that a broad reading of the word “privilege” is consistent with the 1968 addition of this provision to the Florida Constitution.<sup>152</sup> After so concluding, the Court found that the HGL is a special law granting to a corporation prohibited rights, benefits, and advantages amounting to a privilege.<sup>153</sup> This special law “alter[ed] the balance of power” between Lawnwood and its medical staff.<sup>154</sup>

#### B. *Ultra Vires Doctrine*

Cambridge Credit Counseling Corporation (Guarantor), a Massachusetts corporation, guaranteed the leasehold obligations of Brighton Credit Corporation (Tenant) to 7100 Fairway, LLC (Landlord).<sup>155</sup> The guaranty was made in connection with the assignment of the lease to Tenant by a third party.<sup>156</sup> The assignment and the guaranty were both signed by John Puccio, as president of Guarantor, and the guaranty provided that Guarantor was the parent and owner of all of the shares of Tenant.<sup>157</sup> After Tenant defaulted on

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147. *Id.*

148. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 510. It was undisputed that the new law “affected only the two private hospitals in St. Lucie County,” both owned by the same parent corporation. *Id.* at 508.

149. *Id.* at 510.

150. 114 N.W. 588 (Neb. 1908).

151. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 511–12 (quoting *City of Plattsmouth*, 114 N.W. at 590).

152. *Id.* at 513–14.

153. *Id.* at 518.

154. *Id.*

155. *Cambridge Credit Counseling Corp. v. 7100 Fairway, LLC*, 993 So. 2d 86, 88 (Fla. 4th Dist. Ct. App. 2008).

156. *Id.*

157. *Id.*

the lease during the fifth year, Landlord sued Tenant under the lease and Guarantor under the guaranty agreement.<sup>158</sup> Tenant defaulted in the action and judgment was entered against it, but Guarantor filed an answer with affirmative defenses.<sup>159</sup> Landlord's motion for summary judgment as to the defenses raised by Guarantor was granted, and Guarantor appealed.<sup>160</sup> Guarantor had alleged as an affirmative defense that its guaranty was ultra vires under the law of Massachusetts, the state in which it was incorporated.<sup>161</sup> Guarantor argued that Massachusetts law should be applied, and that under the law of Massachusetts, a public charity is prohibited from guaranteeing the obligations of another.<sup>162</sup> Guarantor claimed that it was a public charity under Massachusetts law.<sup>163</sup> Although Guarantor apparently qualified as a charity under section 501(c)(3) of the Internal Revenue Code,<sup>164</sup> the appellate court was not convinced of Guarantor's status as a public charity under Massachusetts law.<sup>165</sup> However, Guarantor's status under Massachusetts law did not matter since Florida law applied.<sup>166</sup> Not only was performance under the lease and guaranty to be in Florida, but both instruments had "Florida choice of law" provisions.<sup>167</sup> Under section 617.0304(2) of the *Florida Statutes*, the claim of ultra vires is available only to corporate shareholders in derivative actions or to the attorney general.<sup>168</sup> A corporation cannot rely on the ultra vires doctrine as a defense to an agreement with a third party voluntarily entered into by the corporation, and the trial court was affirmed.<sup>169</sup> Guarantor also had alleged that Mr. Puccio, as its president, did not have the actual or apparent authority to execute the guaranty.<sup>170</sup> The Fourth District likewise did not disturb the trial court's finding that Mr. Puccio had apparent authority to sign the guaranty.<sup>171</sup> The appellate court, quoting *Lensa Corp. v. Poincia-*

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158. *Id.*

159. *Id.*

160. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 88.

161. *Id.*

162. *Id.*

163. *Id.*

164. See I.R.C. § 501(c)(3) (2006).

165. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 89.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 90–91. The court distinguished *Chatlos Found., Inc. v. D'Arata*, a case relied on by Guarantor, because that case involved organizational or internal matters governed by the state of incorporation, whereas this case involved transactions between the Guarantor and third parties. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 90 (citing *Chatlos Found., Inc. v. D'Arata*, 882 So. 2d 1021 (Fla. 5th Dist. Ct. App. 2004)).

170. *Id.* at 90.

171. *Id.*

*na Gardens Ass'n*,<sup>172</sup> listed the three elements necessary for there to be a finding of apparent agency as follows: “(1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance [on the] representation.”<sup>173</sup> Finding that the execution of the lease guaranty was an act done “in the ordinary course of business,” the Fourth District applied “the presumption of authority” that has been “consistently recognized” by the courts with respect to the acts of corporate presidents, finding that the first requirement was met.<sup>174</sup> The reliance requirement was met because the guaranty itself said that Landlord would not have agreed to the lease assignment without the guaranty.<sup>175</sup> The change of position requirement was met because Landlord released the original tenant.<sup>176</sup> The appellate court concluded that there was no remaining material question of fact.<sup>177</sup> But just in case there was still an issue of fact regarding apparent authority, the Fourth District observed that Guarantor was estopped from denying the validity of the guaranty five years after signing it.<sup>178</sup> Therefore, the trial court correctly entered summary judgment in favor of Landlord on this issue as well.<sup>179</sup>

### C. *Piercing the Corporate Veil*

IAT Group, Inc. (IAT) was the successful bidder for the purchase of stock in two subsidiaries that were wholly owned by Grupo Empresarial Agrícola Mexicano, S.A. de C.V. (GEAM), a Mexican corporation, and Mr. Abu-Ghazaleh was IAT's chairman.<sup>180</sup> Mr. Bours was then the chairman of GEAM.<sup>181</sup> The GEAM subsidiary involved in this appeal was Fresh Del Monte Produce, NV (FDMP NV).<sup>182</sup> IAT formed a subsidiary, Fresh Del Monte Produce, Inc. (FDMP Inc.) for the acquisition of the FDMP NV stock.<sup>183</sup> Owners of a minority interest in GEAM, “identif[y]ng themselves as de facto shareholders of” FDMP NV (Plaintiffs), claimed that the pur-

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172. 765 So. 2d 296 (Fla. 4th Dist. Ct. App. 2000).

173. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 90 (quoting *Lensa Corp.*, 765 So. 2d at 298).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 90.

179. *See id.* at 91.

180. *Chaul v. Abu-Ghazaleh*, 994 So. 2d 465, 467 (Fla. 3d Dist. Ct. App. 2008).

181. *Id.*

182. *Id.*

183. *Id.*

chase and sale of the FDMP NV stock was tainted by dishonesty and sued to recover damages for the alleged fraud.<sup>184</sup> They sued IAT, Mr. Abu-Ghazaleh, GEAM, Mr. Bours, and FDMP Inc. (collectively referred to as Defendants), alleging that GEAM “received inadequate consideration” for the sale of FDMP NV as a result of GEAM’s then chairman’s breach of his fiduciary duty.<sup>185</sup> Defendants alleged that Plaintiffs lacked standing, but Defendants’ summary judgment motion based on this argument was denied.<sup>186</sup> The case went to trial, and the jury found for Defendants.<sup>187</sup> Plaintiffs appealed, and Defendants filed a cross-appeal from the trial court’s denial of their motion for summary judgment.<sup>188</sup> The Third District Court of Appeal reversed, finding that the trial court should have granted Defendants’ motion for summary judgment.<sup>189</sup> Plaintiffs’ claims were derivative of their ownership of stock in GEAM.<sup>190</sup> They should have instituted “a shareholder derivative action.”<sup>191</sup> In addition, Plaintiffs could not get around the fact that their claim was derivative by “invoking the alter ego doctrine.”<sup>192</sup> They could “not pierce their own corporate veil” to claim standing with respect to the corporation’s assets.<sup>193</sup> A direct action by Plaintiffs would only have been appropriate if the right Plaintiffs sought to enforce existed in them as stockholders of FDMP NV, which it did not.<sup>194</sup> Plaintiffs also argued that the sale of FDMP was a “de facto merger,” but the appellate court did not agree.<sup>195</sup>

#### D. Minority Shareholder Appraisal Rights

*Foreclosure Freesearch, Inc. v. Sullivan*,<sup>196</sup> while nominally about the elements necessary to support injunctive relief, is instructive as to a minority shareholder’s stock appraisal rights under section 607.1302(1)(d) of the *Florida Statutes*.<sup>197</sup> In *Foreclosure Freesearch*, Mr. Geisen (Majority Shareholder) was the founder and majority shareholder of Foreclosure Freesearch, Inc.

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184. *Id.* at 466–67. These shareholders held a total of direct and indirect ownership of 6.3 percent of the shares of GEAM. *Chaul*, 994 So. 2d at 467.

185. *Id.* at 466–67.

186. *Id.* at 466.

187. *Id.* at 467.

188. *Id.* at 466.

189. *Chaul*, 994 So. 2d at 466.

190. *Id.*

191. *Id.*

192. *Id.* at 467.

193. *Id.*

194. *Chaul*, 994 So. 2d at 467.

195. *Id.* at 467–68.

196. 12 So. 3d 771 (Fla. 4th Dist. Ct. App. 2009).

197. *Id.* at 773.



(Corporation), which in turn, was the defendant in an action instituted by the minority shareholders, Mr. Sullivan and Mr. Mutillo (Minority Shareholders) over various corporate matters including whether Minority Shareholders were in fact shareholders of Corporation.<sup>198</sup> Claims and counterclaims were made.<sup>199</sup> Seeking to bring the litigation to a close, Majority Shareholder caused Corporation to initiate a reverse stock split.<sup>200</sup> In this instance, a reverse stock split meant that Minority Shareholders would each end up with less than one share—a fractional share—of Corporation, and the fractional share of each of them would be purchased by Corporation.<sup>201</sup> The reverse stock split invoked Minority Shareholders' statutory appraisal rights under section 607.1302(1)(d) of the *Florida Statutes*.<sup>202</sup> Minority Shareholders asked the trial judge to temporarily enjoin the appraisal process, claiming that once their corporate interests were purchased, they would no longer have standing to pursue their counterclaims.<sup>203</sup> The judge agreed and enjoined the appraisal process.<sup>204</sup> The concern was that Majority Shareholder may be liable for improper actions that reduced the value of Corporation.<sup>205</sup> If so, ending the litigation in this manner, that is by virtue of having the appraisal proceed, would prevent the ascertainment of the "true" value of Corporation and the minority shares.<sup>206</sup>

The Fourth District Court of Appeal reversed,<sup>207</sup> concluding that injunctive relief is an equitable remedy, and Minority Shareholders had an adequate remedy at law.<sup>208</sup> The appellate court held that "the appraisal process provides an adequate remedy at law" noting that "[s]tatutory proceedings are regarded as law action."<sup>209</sup> In reaching its decision that the appraisal process was to proceed, the Fourth District Court of Appeal relied on *Wil-*

198. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 773.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 774. This was the reason given by the minority shareholder in *Williams* for what they called a "conditional election of appraisal rights" which election was considered by the trial court to be "a nullity." *Williams v. Stanford*, 977 So. 2d 722, 725 (Fla. 1st Dist. Ct. App. 2008). Hence the minority shareholders in *Williams* were deemed by the trial court to have waived their appraisal rights, and they did not appeal that ruling. *Id.*

204. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 774.

205. *See id.*

206. *See id.*

207. *Id.* at 778.

208. *Id.*

209. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 775–76 (quoting *Adams v. Dade County*, 202 So. 2d 585, 586 (Fla. 3d Dist. Ct. App. 1967)).

*liams v. Stanford*,<sup>210</sup> a 2008 decision of the First District Court of Appeal involving shareholder appraisal rights under section 607.1302(1).<sup>211</sup> The First District there held that if certain requirements were met, minority shareholders could make a claim under section 607.1302(4)(b) of the *Florida Statutes* that wrongful acts by a majority shareholder adversely affected value.<sup>212</sup> The Fourth District Court of Appeal in *Foreclosure Freesearch* stated that if Minority Shareholders could support the claims, then, as held in *Williams*, they ““may be entitled to equitable remedies beyond an appraisal proceeding if the alleged acts have so besmirched the propriety of the challenged transaction that no appraisal could fairly compensate the aggrieved minority shareholder.””<sup>213</sup> Minority Shareholders’ counterclaim included a count for breach of fiduciary duty by Majority Shareholder for misappropriation of corporate funds and a count against Corporation for wrongfully withheld distributions of profits.<sup>214</sup> Thus, although Majority Shareholder can invoke the appraisal process to eliminate the rights of Minority Shareholders,<sup>215</sup> Minority Shareholders can challenge appraised value and, under the *Williams* analysis, go beyond the appraisal pursuant to the fraud exception of section 607.1302(4)(b) of the *Florida Statutes*, provided they meet the requirements set forth in *Williams*.<sup>216</sup> The Fourth District Court of Appeal said that “[b]ecause [Minority Shareholders] are not deprived of their ability to seek relief beyond the appraisal if they satisfy the *Williams* analysis, they have an adequate remedy at law.”<sup>217</sup>

#### E. Shareholders’ Agreements: Arbitrability

In *Breakstone v. Breakstone Homes, Inc.*,<sup>218</sup> the Shareholders’ Agreement between Breakstone Homes, Inc. (Corporation) and its shareholders provided in part that “[a]ny controversy or claim arising out of or relating to

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210. 977 So. 2d 722 (Fla. 1st Dist. Ct. App. 2008).

211. See *id.* at 726–27; Landau, 2007–2008 Survey, *supra* note 120, at 86–87. The appraisal rights in *Williams* derived from subsection (c) rather than subsection (d) of section 607.1302(1).

212. *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st Dist. Ct. App. 2008).

213. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 777 (citing *Williams*, 977 So. 2d at 730).

214. *Id.* at 773, 778.

215. *Id.* at 778. The appellate court extended the time within which Minority Shareholders could exercise their appraisal rights to seven days after the date of the issuance of the court’s “mandate to exercise their rights in the appraisal process.” *Id.*

216. *Id.* at 777.

217. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 778.

218. 999 So. 2d 731 (Fla. 3d Dist. Ct. App. 2009).

this Agreement or a breach hereof shall be finally settled by arbitration.”<sup>219</sup> Corporation brought an action against Mr. Breakstone (Director), who was one of three directors (and a shareholder), alleging breaches of fiduciary duties as a director of Corporation.<sup>220</sup> Director sought an order compelling arbitration, and in response, Corporation relied on *Seifert v. U.S. Home Corp.*,<sup>221</sup> where the Supreme Court of Florida set forth the three-pronged test that a court must apply before it compels arbitration.<sup>222</sup> Under the second prong of the *Seifert* test, there must be “an arbitrable issue.”<sup>223</sup> Corporation argued that its claim was not arbitrable because it was “a tort claim ‘unrelated to the rights and obligations’” under the Shareholders’ Agreement.<sup>224</sup> The trial court denied Director’s motion to compel arbitration, and he appealed.<sup>225</sup> The Third District Court of Appeal reversed.<sup>226</sup> The Shareholders’ Agreement here contemplated breach of fiduciary duty by a director and provided a remedy.<sup>227</sup> Corporation’s claim was “significantly related to the rights and obligations in the Agreement” and arbitration was required.<sup>228</sup>

#### F. Joint Venture

North Broward Hospital District (NBHD), having become a Trauma Level II hospital, needed general surgeons for its emergency room.<sup>229</sup> NBHD sought the services of several surgeons, asking them to form a corporation that NBHD would deal with, rather than dealing with the surgeons individually.<sup>230</sup> Several surgeons, including Dr. Triana, decided that they would, individually, through their own practices, as independent contractors, provide surgical services to NBHD through contracts between NBHD and Fort Lauderdale Surgery Associates, P.A. (FLSA), a corporation newly formed for

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219. *Id.* at 732 (emphasis omitted).

220. *Id.*

221. 750 So. 2d 633 (Fla. 1999).

222. *Breakstone*, 999 So. 2d at 732. Under *Seifert*, the court must determine: (1) if there is “a valid written agreement to arbitrate;” (2) if there is an arbitrable issue; and (3) if there has been a waiver of the right to arbitrate. *Seifert*, 750 So. 2d at 636.

223. *Seifert*, 750 So. 2d at 636.

224. *Breakstone*, 999 So. 2d at 732.

225. *Id.*

226. *Id.* at 733.

227. *Id.*

228. *Id.*

229. *Sheridan Healthcorp, Inc. v. Amko*, 993 So. 2d 167, 168 (Fla. 4th Dist. Ct. App. 2008).

230. *Id.* The services were to be provided to persons who were indigent and did not have insurance. *Id.*

this purpose.<sup>231</sup> The surgeons' interests in FLSA would be based on the degree of each surgeon's participation.<sup>232</sup> When the corporation was formed, the only stock issued was to Dr. O'Rourke.<sup>233</sup> Four of the doctors other than Dr. Triana were named the officers of FLSA.<sup>234</sup> NBHD and FLSA then executed a written agreement that detailed the surgical services FLSA would provide, specified standards to be met, and required Dr. O'Rourke to "oversee" the other surgeons, including Dr. Triana.<sup>235</sup> Dr. Triana and the other surgeons signed agreements with FLSA that confirmed FLSA's arrangement with NBHD and the surgeons' status as independent contractors for FLSA.<sup>236</sup> Although these agreements were not signed by FLSA, the terms of the independent contractor agreements were followed.<sup>237</sup> The surgeons subsequently adopted "by-laws" which required that any decisions be by unanimous vote of the surgeons.<sup>238</sup> During the term of the various agreements, the other surgeons voted to fire Dr. Triana.<sup>239</sup> Dr. Triana sued FLSA and the three doctors who were then the officers of FLSA.<sup>240</sup> Dr. Triana alleged that a breach of fiduciary duty owed to him under their joint venture had occurred, arising out of the absence of adherence to corporate formalities and by virtue of firing him.<sup>241</sup> The trial court entered a summary judgment in favor of the defendants, reasoning that even if there had been a joint venture, it terminated when FLSA was formed, the purpose of the joint venture's creation having been realized.<sup>242</sup> The trial court ruled that under corporate law, the decision to fire Dr. Triana was reasonable, and thus proper under "the business judgment rule."<sup>243</sup> The Fourth District Court of Appeal reviewed the law as to when there is a termination of a joint venture.<sup>244</sup> The formation of a corporation may not be the end of a joint venture if forming the corporation

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231. *Id.* at 168–69.

232. *Id.* at 169.

233. *Sheridan Healthcorp, Inc.*, 993 So. 2d at 169.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Sheridan Healthcorp, Inc.*, 993 So. 2d at 169.

239. *Id.* Dr. Triana objected to the firing based on the absence of unanimous consent. *Id.* He then learned that no FLSA stock had been issued to him. *Id.*

240. *Id.* One of the officers died before Dr. Triana was fired. *Sheridan Healthcorp, Inc.*, 993 So. 2d at 168 n.1.

241. *Id.* at 169–70.

242. *Id.* at 170. With respect to another count that was based upon the unsigned agreement with FLSA, the appellate court found that there were material factual issues and summary judgment should not have been granted to FLSA on this count. *Id.* at 171.

243. *Id.* at 170.

244. *See Sheridan Healthcorp, Inc.*, 993 So. 2d at 170.

was not the purpose of the joint venture, but rather was a means to an end.<sup>245</sup> Here, there were material issues of fact remaining as to whether there was a continuing joint venture.<sup>246</sup> Joint venturers owe each other a fiduciary duty.<sup>247</sup> By failing to decide the factual issue of whether a joint venture existed and its proper purpose, the trial court's application of the business judgment rule was error.<sup>248</sup>

## V. CONSUMER RIGHTS

*Ocana v. Ford Motor Co.*<sup>249</sup> sets forth some important principles with respect to the Magnuson-Moss Warranty Act (MMWA)<sup>250</sup> and its interaction with state law.<sup>251</sup> Mr. Ocana leased a Land Rover from Warren Henry Automobiles, Inc. (Dealership).<sup>252</sup> The Land Rover was new and came with a "New Vehicle Limited Warranty" from Ford Motor Company (Ford).<sup>253</sup> Dealership assigned to Mr. Ocana all of Dealership's rights under the "standard manufacturer's new vehicle warranty."<sup>254</sup> The lease agreement stated that Mr. Ocana was taking the Land Rover "AS IS" and the provision continued, also in capital letters, with the statement that "NO WARRANTIES OR REPRESENTATIONS, EITHER EXPRESS OR IMPLIED" with respect to any part of the Land Rover were being made.<sup>255</sup> The provision included a statement, still in capital letters, that there was "NO WARRANTY OF MERCHANTABILITY OR FITNESS . . . FOR ANY PARTICULAR PURPOSE."<sup>256</sup> Mr. Ocana then sued Ford and Dealership for breach of "express and implied warranties [under the MMWA]."<sup>257</sup> He alleged that the vehicle had been taken back to Dealership at least four times for repairs in the first year of the lease.<sup>258</sup> The complaint was dismissed with prejudice,

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245. *Id.* (citing *Donahue v. Davis*, 68 So. 2d 163, 171 (Fla. 1953)).

246. *Id.* at 171.

247. *Id.*

248. *Id.*

249. 992 So. 2d 319 (Fla. 3d Dist. Ct. App. 2008).

250. *See id.* at 322; Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–12 (2006).

251. *See Ocana*, 992 So. 2d at 322–23; *see, e.g.*, FLA. STAT. § 672.313 (2009).

252. *Ocana*, 992 So. 2d at 322.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Ocana*, 992 So. 2d at 322. Mr. Ocana alleged that Ford and Dealership "fail[ed] to repair the vehicle within a reasonable amount of time or reasonable number of repair attempts" under the MMWA. *Id.* at 322–23.

258. *Id.* at 322.

and Mr. Ocana appealed.<sup>259</sup> The appellate court noted that Mr. Ocana was trying to utilize a portion of the MMWA that applies only to full warranties,<sup>260</sup> and which allows a consumer to choose between taking a refund for the defective product or a replacement free of charge if “a defect or malfunction” has not been remedied by the warrantor “after a reasonable number of attempts.”<sup>261</sup> Mr. Ocana’s problem, according to the appellate court, was that this option under the MMWA applies only to full warranties and not to limited warranties.<sup>262</sup> Ford had given a limited warranty.<sup>263</sup> This meant that Mr. Ocana was required to prove breach of Ford’s limited warranty.<sup>264</sup> This in turn required proof “that Ford refused or failed to adequately repair a covered item.”<sup>265</sup> Mr. Ocana only proved the car was taken in four times.<sup>266</sup> Although the MMWA authorizes a federal cause of action for breach of implied warranty, such a claim must be based on state law principles.<sup>267</sup> In Florida, privity of contract is required to support a claim of implied warranty, and Mr. Ocana did not have privity of contract with Ford.<sup>268</sup> He failed to prove that Dealership was acting as Ford’s agent in the lease transaction, which was necessary to establish privity.<sup>269</sup> As to Mr. Ocana’s claim against Dealership, the Third District Court of Appeal first noted that in an “as is” contract, “causation is generally negated as a matter of law.”<sup>270</sup> The consumer assumes the risk.<sup>271</sup> Dealership also clearly and conspicuously disclaimed any and all warranties and representations.<sup>272</sup> The court acknowledged that Mr. Ocana relied on *Gates v. Chrysler Corp.*,<sup>273</sup> where the Fourth District applied the Magnuson-Moss refund/replacement consumer option to

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259. *Id.* at 323.

260. *Id.*; see Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2303(a)(1), 2304(a) (2006).

261. *Ocana*, 992 So. 2d at 323 (quoting 15 U.S.C. § 2304(a)(4)).

262. *See id.* at 325.

263. *Id.* at 323.

264. *Id.* at 324.

265. *Id.*

266. *Ocana*, 992 So. 2d at 324.

267. *See id.* at 323–24.

268. *Id.* at 325–26.

269. *Id.* at 326.

270. *Id.* at 327 (quoting *Owens v. Mercedes-Benz USA, LLC*, 541 F. Supp. 2d 869, 871 (N.D. Tex. 2008)).

271. *Ocana*, 992 So. 2d at 327.

272. *Id.*

273. 397 So. 2d 1187 (Fla. 4th Dist. Ct. App. 1981).

limited warranties.<sup>274</sup> The Third District described *Gates* as an “outlier,” but did not certify conflict with it to the Supreme Court of Florida.<sup>275</sup>

## VI. CONTRACTS

### A. *Contract Reformation*

The litigation in *Goodall v. Whispering Woods Center LLC*<sup>276</sup> arose out of a real estate purchase agreement that followed a deposit agreement.<sup>277</sup> Buyer alleged that the deposit agreement required Seller, who was also the developer, to raise the ceiling height of the purchased suites to twelve feet, and that the purchase price as stated in the deposit agreement included the price for the change in the height of the ceilings.<sup>278</sup> Buyer also alleged that Seller promised that the purchase agreement would be drafted with terms identical to those in the deposit agreement.<sup>279</sup> However, the purchase agreement provided for a ceiling height of ten feet, not twelve feet.<sup>280</sup> The purchase agreement also contained a boilerplate clause, in capital letters, with language to the effect that Buyer had read each and every provision, that the purchase agreement constituted the entire agreement, and prior written or oral agreements, representations, or statements not reflected or included in the purchase agreement were without effect.<sup>281</sup> Seller refused to build out the ceilings to twelve feet, and Buyer sued Seller.<sup>282</sup> Buyer sought reformation of the contract, alleged that Seller breached the reformed contract, sought rescission, and also claimed unjust enrichment.<sup>283</sup> The trial court found that Buyer had not stated any cause of action and dismissed Buyer’s complaint with prejudice.<sup>284</sup> Buyer appealed, and the Fourth District Court of Appeal affirmed the trial court’s dismissal of the rescission and unjust enrichment claims, but reversed the dismissal of the reformation and breach of the re-

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274. *Ocana*, 992 So. 2d at 324.

275. *Id.* at 325.

276. 990 So. 2d 695 (Fla. 4th Dist. Ct. App. 2008).

277. *Id.* at 697.

278. *Id.*

279. *Id.* at 697–98.

280. *Id.* at 698.

281. *Goodall*, 990 So. 2d at 698.

282. *Id.* at 697.

283. *Id.* at 698–99.

284. *Id.* at 699.

formed contract claims.<sup>285</sup> The appellate court reviewed the rules regarding reformation.<sup>286</sup>

First addressed was the rule allowing the equitable remedy of reformation of a written instrument that does not accurately express the parties' intent because of a mutual mistake.<sup>287</sup> In such a case, the defective agreement or instrument "is not altered;" it is just reformed so that it reflects the parties' actual intent.<sup>288</sup>

Second, a mutual mistake may be the result of "scrivener's error or inadvertence" so that what the parties agreed to is not what gets expressed in the agreement when reduced to writing.<sup>289</sup> Third, reformation is also available in the case of a mistake by only one of the parties where the other party has engaged in inequitable conduct.<sup>290</sup> The appellate court held that Buyer's allegations were sufficient to withstand a motion to dismiss.<sup>291</sup> Buyer had sufficiently pled a claim for reformation on the ground of mutual mistake.<sup>292</sup> Buyer had also sufficiently pled inequitable conduct on the part of Seller.<sup>293</sup> Seller's argument that the boilerplate "merger and integration clause" in the purchase agreement prevented Buyer from seeking reformation—an equitable remedy—was rejected by the court.<sup>294</sup> Also of no help to Seller was its argument that the complaint should be dismissed because Buyer "was negligent in failing to read the Agreement carefully" before signing it.<sup>295</sup> According to the appellate court, signing an agreement "without reading it with care" normally results in the signer being bound.<sup>296</sup> However, the appellate court found that the exception under section 157, comment b, of the Restatement (Second) of Contracts was applicable since the parties had agreed on the terms that were supposed to be included in the purchase agreement.<sup>297</sup> Thus, mere "negligence in failing to read the writing does not" prevent an action for reformation of the agreement.<sup>298</sup> Gross negligence would need to be shown, and the question of whether there was gross negligence on the part

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285. *Id.* at 697.

286. *See Goodall*, 990 So. 2d at 699.

287. *Id.* (quoting *Tobin v. Mich. Mut. Ins. Co.*, 948 So. 2d 692, 696 (Fla. 2006) (per curiam)).

288. *Id.*

289. *Id.* (citing *Providence Square Ass'n v. Biancardi*, 507 So. 2d 1366, 1372 (Fla. 1987)).

290. *Id.* (citing *Providence Square Ass'n*, 507 So. 2d at 1372 n.3).

291. *See Goodall*, 990 So. 2d at 697, 699.

292. *Id.* at 699.

293. *Id.*

294. *Id.* at 700.

295. *Id.*

296. *Goodall*, 990 So. 2d at 700.

297. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. b (1981)).

298. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. b).



of Buyer was a question of fact not properly decided on a motion to dismiss.<sup>299</sup>

### B. *Specific Performance*

Landlord, as seller, and Tenant, as buyer, signed an instrument styled "Affidavit."<sup>300</sup> The instrument provided for sale and purchase of commercial real estate described in the affidavit by street address and property folio number.<sup>301</sup> The purchase price was stated as \$200,000 with an initial \$59,000 deposit and an additional \$25,000 to be paid prior to closing.<sup>302</sup> Closing was not to be after December 31, 2004.<sup>303</sup> Tenant alleged that the parties verbally agreed to postpone the closing for almost a year and that Landlord ultimately refused to proceed to closing.<sup>304</sup> Tenant sued Landlord seeking specific performance and damages for breach of contract.<sup>305</sup> The trial court dismissed Tenant's complaint, and Tenant appealed.<sup>306</sup> The Third District Court of Appeal, relying on *Rundel v. Gordon*,<sup>307</sup> agreed with the trial court that the affidavit was not sufficiently definite to warrant specific performance.<sup>308</sup> However, the trial court should not have dismissed the damages claim.<sup>309</sup> Landlord's argument that if the terms of the affidavit were not specific enough to justify specific performance, then they were not specific enough to warrant a damage award was rejected.<sup>310</sup> The Third District Court held that less certainty as to the terms of a contract is required in a suit for damages than is required to obtain specific performance.<sup>311</sup>

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299. *Id.* at 701 (citing *Cont'l Cas. Co. v. City of Ocala*, 149 So. 381, 386 (Fla. 1933)).

300. *Alzate v. Lazaro*, 992 So. 2d 424, 425 (Fla. 3d Dist. Ct. App. 2008).

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Alzate*, 992 So. 2d at 425. The trial court, in dismissing the second amended complaint, granted leave to Tenant to again amend so as to seek a refund of the deposit. *Id.* at 425–26.

306. *Id.*

307. 111 So. 386 (Fla. 1927).

308. *Alzate*, 992 So. 2d at 426 (citing *Fox v. Sails at Laguna Club Dev. Corp.*, 403 So. 2d 456, 458 (Fla. 3d Dist. Ct. App. 1981); *Socarras v. Claughton Hotels, Inc.*, 374 So. 2d 1057, 1060 (Fla. 3d Dist. Ct. App. 1979)).

309. *See id.*

310. *Id.*

311. *Id.* The trial court also had dismissed plaintiff's fraud claim, and the appellate court concurred. *Alzate*, 992 So. 2d at 427.

### C. Statute of Frauds

In *Brace v. Comfort*,<sup>312</sup> Mr. and Mrs. Brace (Plaintiffs) sued Ms. Comfort (Comfort), as well as Steven King (King) and Stirling V. Realty, a Florida Limited Partnership owned by King (King/Stirling), and Roy D. Boone (Boone) (collectively referred to as the Other Defendants), in connection with a business deal that involved real estate.<sup>313</sup> There were some complicated transactions between and among the parties, but the result was that King/Stirling ultimately transferred the subject real property to Boone, who was Comfort's father.<sup>314</sup> Plaintiffs alleged that the property should have been transferred to them by virtue of their written agreement with Comfort, which agreement they further alleged had been ratified by King/Stirling.<sup>315</sup> Plaintiffs filed a complaint against Comfort and the Other Defendants.<sup>316</sup> There were counts that sought declaratory relief and specific performance.<sup>317</sup> Other counts alleged civil conspiracy, tortious interference with a contract, unjust enrichment, and promissory estoppel.<sup>318</sup> Citing Florida's statute of frauds, section 725.01 of the *Florida Statutes*, the trial court dismissed most of the counts against the Other Defendants, and Plaintiffs appealed.<sup>319</sup> With respect to the claim for declaratory relief, the Second District Court of Appeal reversed, ruling that the statute of frauds was not a bar.<sup>320</sup> That claim was actually based on two written agreements and sought a declaration of Plaintiffs' and Boone's respective rights under those agreements.<sup>321</sup> Therefore, because the request for a declaratory judgment was based on written agreements, the trial court should not have dismissed that count.<sup>322</sup> The appellate court also held that the statute of frauds was not a bar to the unjust enrichment and promissory estoppel claims, and the appellate court reversed the trial court with respect to these claims.<sup>323</sup> However, with respect to the specific performance claim, since there was no contract between Plaintiffs and Boone, the party against whom Plaintiffs sought specific performance, the trial court

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312. 2 So. 3d 1007 (Fla. 2d Dist. Ct. App. 2008).

313. *Id.* at 1008–09.

314. *See id.* at 1009.

315. *See id.* at 1009, 1011–12.

316. *Id.* at 1009–10.

317. *Brace*, 2 So. 3d at 1009–12.

318. *Id.* at 1010.

319. *Id.*

320. *Id.* at 1011.

321. *Id.* at 1010.

322. *Brace*, 2 So. 3d at 1011.

323. *Id.* at 1011, 1013.

was affirmed on its dismissal of that claim.<sup>324</sup> On the other hand, the claims for civil conspiracy and for tortious interference with contract were not barred by the statute of frauds.<sup>325</sup> These claims were improperly dismissed by the trial court because the claims were based on improper actions rather than the contracts themselves.<sup>326</sup>

#### D. *Third Party Beneficiary Contract and the Undertaker Doctrine*

In *Travelers Insurance Co. v. Securitylink from Ameritech, Inc.*,<sup>327</sup> Securitylink from Ameritech, Inc. (Alarm Company) installed an alarm system for Original Worldwide, Ltd. (Owner) pursuant to their agreement, which also provided that Alarm Company was to monitor the alarm in Owner's warehouse.<sup>328</sup> Alarm Company then hired Vanguard Security, Inc. (Security Company) to inspect and investigate alarm signals from the warehouse when notified by Alarm Company that the alarm had sounded.<sup>329</sup> On the occasion in question, the warehouse alarm sounded four times and Security Company sent a guard to investigate the first three times, finding nothing suspicious.<sup>330</sup> When the alarm sounded for the fourth time, Alarm Company asked Owner to have someone go to the warehouse, and it was only then, on the fourth trip, that a theft was discovered.<sup>331</sup> Travelers Insurance Company (Insurer) paid Owner's claim and then, as subrogee, sued Alarm Company and Security Company.<sup>332</sup> Insurer alleged that Alarm Company and Security Company (referred to collectively as Companies) were negligent, and Insurer included a claim for gross negligence.<sup>333</sup> There were also allegations of breach of contract against both Companies.<sup>334</sup> The trial court determined, as a matter of law, that there was no duty owed by Security Company to Owner, and all of Insurer's claims against Security Company were dismissed.<sup>335</sup> Insurer appealed, and the Third District Court of Appeal reversed.<sup>336</sup> In addition to

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324. *Id.* at 1012. The appellate court's affirmance on this claim was based on different reasoning than that of the trial court. *Id.*

325. *Id.* at 1011.

326. *Brace*, 2 So. 3d at 1011.

327. 995 So. 2d 1175 (Fla. 3d Dist. Ct. App. 2008).

328. *Id.* at 1176.

329. *Id.*

330. *Id.*

331. *Id.* There was a ladder that descended from a skylight that was broken, and merchandise was determined to be missing. *Travelers Ins. Co.*, 995 So. 2d at 1176.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Travelers Ins. Co.*, 995 So. 2d at 1176.

relying on “well-settled” Florida law that a non-contracting, but intended beneficiary, may sue for breach of contract, the Third District also relied on *Clay Electric Cooperative, Inc. v. Johnson*,<sup>337</sup> where the Supreme Court of Florida adopted the “undertaker doctrine” of section 324A of the Restatement (Second) of Torts.<sup>338</sup> Under the doctrine, liability may be found for physical harm that results to a third party if the actor undertakes to provide services, even without compensation, which the actor should know are necessary to protect the third party, including the possessions of the third party, and the actor does not act with reasonable care.<sup>339</sup> In order for the doctrine to apply, the lack of reasonable care must have “increase[d] the risk of harm,” the actor must have undertaken the performance of a duty that another owes to the third party, and the harm is the result of the reliance by the other party or the third party on the actor’s undertaking.<sup>340</sup> The appellate court found that Insurer’s allegations were sufficient under this doctrine.<sup>341</sup>

#### E. Forum Selection Provision

AT&T Corp. sued Travel Express Investment, Inc. (Travel Express) in Seminole County, Florida.<sup>342</sup> Travel Express sought dismissal of the breach of contract action, alleging improper venue.<sup>343</sup> Travel Express relied on a clause in the parties’ contract which provided that “[t]he parties consent to the exclusive jurisdiction of the courts located in New York City, USA.”<sup>344</sup> The trial court denied Travel Express’s motion to dismiss, and Travel Ex-

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337. 873 So. 2d 1182 (Fla. 2003).

338. *Travelers Ins. Co.*, 995 So. 2d at 1177; see RESTATEMENT (SECOND) OF TORTS § 324A (1965).

339. *Travelers Ins. Co.*, 995 So. 2d at 1177 (quoting RESTATEMENT (SECOND) OF TORTS § 324A).

340. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 324A).

341. *Id.* at 1177–78. Security Company also argued that the dismissal of the complaint was proper because it was found that there had been full performance of its contractual obligation, that is, that Alarm Company had exercised reasonable care. *Id.* at 1178. The appellate court said this determination should not have been made on a motion to dismiss. *Id.*

342. *Travel Express Inv., Inc. v. AT&T Corp.*, 14 So. 3d 1224, 1225 (Fla. 5th Dist. Ct. App. 2009).

343. *Id.*

344. *Id.* The appellate court pointed out that the contract was “prepared by AT&T for its customer.” *Id.* But this was not a case of the court finding an ambiguity and resolving it against the party that drafted the contract. The court said that “[t]his exclusivity provision clearly makes this clause unambiguous and mandatory.” *Travel Express Inv., Inc.*, 14 So. 3d at 1227 (relying on *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327, 331 (Fla. 3d Dist. Ct. App. 2007)); see also *TECO Barge Line, Inc. v. Hagan*, 15 So. 3d 863, 864 (Fla. 2d Dist. Ct. App. 2009). Thus, the exclusive forum was New York. *Travel Express Inv., Inc.*, 14 So. 3d at 1227.

press appealed.<sup>345</sup> The Fifth District noted that forum selection clauses “fall into two categories: mandatory and permissive.”<sup>346</sup> Although the distinction to be made is generally between a clause by which the parties “consent” to, but do not require a particular jurisdiction, on the one hand, and a clause where filing of a suit in a specified forum is “required,” on the other hand, the issue in this case was different.<sup>347</sup> The question presented was the effect of the word “exclusive” in the applicable provision of the parties’ contract.<sup>348</sup> The Fifth District, relying on its decision in *Sonus-USA, Inc. v. Thomas W. Lyons, Inc.*,<sup>349</sup> and agreeing with the Third District in *Weisser v. PNC Bank, N.A.*,<sup>350</sup> which involved “[a]n almost identical clause,” concluded that the provision was of the mandatory variety.<sup>351</sup> What made it mandatory was the use of the word “exclusive.”<sup>352</sup> Had the parties merely consented to the jurisdiction of the courts located in New York City, the clause would have been permissive and venue in Seminole County would likely not have been disturbed.<sup>353</sup> Having found that the clause was “unambiguous and mandatory,” the appellate court ruled that the clause would only be set aside upon a showing that it would be unfair, unreasonable, or unjust to enforce the provision.<sup>354</sup> There having been no such showing, the decision of the trial court was reversed.<sup>355</sup>

#### F. *Liability Disclaimers*

The Roses purchased a fire alarm system from ADT Security Services, Inc. (ADT).<sup>356</sup> Shortly after the service agreement was signed by the Roses and the alarms were installed, there was a fire in their house.<sup>357</sup> The alarms did not send a fire signal and the house was completely destroyed.<sup>358</sup> State Farm Insurance Company (State Farm), the Roses’ homeowners insurer, paid

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345. *See Travel Express Inv., Inc.*, 14 So. 3d at 1225.

346. *Id.* at 1226.

347. *See id.*

348. *Id.* at 1226.

349. 966 So. 2d 992 (Fla. 5th Dist. Ct. App. 2007).

350. 967 So. 2d 327 (Fla. 3d Dist. Ct. App. 2007).

351. *Travel Express Inv., Inc.*, 14 So. 3d at 1226–27.

352. *Id.* at 1227.

353. *See id.*

354. *Id.* at 1226–27 (quoting *Aqua Sun Mgmt. v. Divi Time Ltd.*, 797 So. 2d 24, 24–25 (Fla. 5th Dist. Ct. App. 2001)).

355. *Id.* at 1227.

356. *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244, 1246 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

357. *Id.*

358. *Id.* The facts stated that the house was presumably struck by lightning. *Id.*

the Roses' policy claim, and State Farm then sued ADT on various theories.<sup>359</sup> The trial court granted ADT's motion for summary judgment, concluding that none of the theories stated a cause of action, and the Roses and State Farm appealed.<sup>360</sup> The first theory addressed by the First District was the "fraud in the inducement" claim based on a representation of the salesman.<sup>361</sup> It was undisputed that when the salesman from ADT met with the Roses, he "represented that the Roses would never lose their house to a fire and that the alarm and fire detection system would save the lives of the Roses' dogs and family members in the event of a fire."<sup>362</sup> The written service contract entered into between the Roses and ADT several weeks later, which agreement required ADT to install the fire alarm system and "provide security and fire detection services," had numerous liability and warranty limitations and disclaimers.<sup>363</sup> The district court acknowledged that the rule in Florida is that summary judgment generally should not be granted with respect to a fraud claim, but said that there are situations where summary judgment on a fraud claim is proper.<sup>364</sup> The court concluded that summary judgment was proper in this case because there could not have been justifiable reliance by the Roses on what the salesman said.<sup>365</sup> According to the First District, there could be no justifiable reliance because the agreement provided in capitalized print that:

NO ALARM SYSTEM CAN GUARANTEE PREVENTION OF LOSS, THAT HUMAN ERROR ON THE PART OF ADT OR THE MUNICIPAL AUTHORITIES IS ALWAYS POSSIBLE, AND THAT SIGNALS MAY NOT BE RECEIVED IF THE TRANSMISSION MODE IS CUT, INTERFERED WITH, OR OTHERWISE DAMAGED. . . . CUSTOMER AGREES THAT ANY REPRESENTATION, PROMISE, CONDITION, INDUCEMENT OR WARRANTY, EXPRESS OR IMPLIED, NOT

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359. *Id.* State Farm, proceeding under the policy's subrogation provision, alleged "breach of express warranty, breach of implied warranty of fitness, breach of implied warranty of merchantability, fraud in the inducement and deceptive trade practices under section 501.211, *Florida Statutes*" by ADT. *Rose*, 989 So. 2d at 1246. Summary judgment was conceded by the Roses and State Farm to be warranted with respect to the deceptive trade practices claim. *Id.* at 1246 n.1.

360. *Id.* at 1246.

361. *Id.* at 1247.

362. *Id.* at 1246.

363. *Rose*, 989 So. 2d at 1246.

364. *Id.* at 1247.

365. *Id.* at 1248.

INCLUDED IN WRITING IN THIS AGREEMENT SHALL  
NOT BE BINDING UPON ANY PARTY . . . .<sup>366</sup>

The agreement also contained language in boldface capital letters that the Roses had read and understood the agreement.<sup>367</sup>

With respect to product liability based on theories of strict liability and warranty, the First District ruled that the case “sounded in contract” because of the contract between ADT and the Roses.<sup>368</sup> Therefore, this was a contract claim, not a tort claim, and the Florida Uniform Commercial Code (UCC) applied.<sup>369</sup> It was permissible under the UCC for ADT to disclaim warranties including “‘implied warranties of merchantability and fitness’”—provided the written disclaimer was conspicuous, expressly referred to merchantability and the Roses understood what was being done.<sup>370</sup> Here, the warranty disclaimers met those requirements.<sup>371</sup>

In the agreement, ADT also prominently disclaimed incidental and consequential damages based on negligence.<sup>372</sup> The First District upheld the negligence disclaimer, observing that while negligence disclaimers are not favored in the law, they will be upheld if they are “‘so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away.’”<sup>373</sup> The First District decided that the negligence liability disclaimers were sufficiently “clear and unequivocal.”<sup>374</sup> Also, there was no showing that ADT violated a statute under which it had “a positive statutory duty to protect the well-being of” another.<sup>375</sup>

Waivers of liability for negligence are also covered in the Torts section of this survey.<sup>376</sup> Of particular importance is the Supreme Court of Florida’s

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366. *Id.*

367. *Id.* at 1247–48.

368. *Rose*, 989 So. 2d at 1248.

369. *Id.*

370. *Id.* at 1248–49.

371. *Id.* at 1248.

372. *Id.* at 1249.

373. *Rose*, 989 So. 2d at 1249 (quoting *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. 1st Dist. Ct. App. 1991)).

374. *Id.*

375. *Id.* *Contra* *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 761 (Fla. 5th Dist. Ct. App. 2008) (holding that Florida law places a duty on building contractors to remain liable “for personal injury caused by their negligent acts”). See Landau, 2007–2008 Survey, *supra* note 120, at 127.

376. See *infra* Part XV.

decision regarding the validity of pre-injury waivers of liability by parents of minors in the context of commercial activities.<sup>377</sup>

### G. *Exclusive Real Estate Listing*

The owner of real estate (Owner) signed a real estate listing agreement with a real estate broker (Listing Agent) that stated in part:

*Exclusive Brokerage Listing.* The exclusive agent for all Units . . . shall be . . . (“Listing Agent”) for a term of ten (10) years . . . Listing Agent shall be the sole listing broker for all Units within the Condominium, and be entitled to payment of a commission on all sales and leases of Units within the Condominium.<sup>378</sup>

Owner entered into a lease with respect to a building that was part of the condominium project but no broker was used.<sup>379</sup> Listing Agent sued for a commission.<sup>380</sup> Both parties relied on definitions in *Florida Real Estate Principles, Practices & Law* by Linda L. Crawford.<sup>381</sup> In this treatise, a distinction is made between an “exclusive-agency listing” and an “exclusive-right-of-sale listing.”<sup>382</sup> In the former, an owner may sell the subject property without owing a commission, provided the buyer did not learn about the property from the broker or someone acting on behalf of the broker.<sup>383</sup> In the latter, it does not matter who sells the property during the term of the listing.<sup>384</sup> The broker is entitled to a commission, even if the owner is the seller.<sup>385</sup> Thus, applying the distinction between the “exclusive right to sell” where the broker is entitled to a commission regardless of whether a broker is involved in the sale, and an “exclusive agency” where the owner still has the right to sell without having to pay a commission, the court determined that the listing agreement in this case was of the exclusive-agency type.<sup>386</sup>

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377. See *Kirton v. Fields (Fields II)*, 997 So. 2d 349, 350 (Fla. 2008); see also *infra* notes 820–47 and accompanying text.

378. *Fischer-Gaeta-Cromwell, Inc. v. Oakwood St. Enters., LLC*, 997 So. 2d 1271, 1272 (Fla. 4th Dist. Ct. App. 2009).

379. *Id.* at 1271–72.

380. *Id.* at 1271.

381. *Id.* at 1272.

382. *Id.*

383. *Fisher-Gaeta-Cromwell, Inc.*, 997 So. 2d at 1272.

384. *Id.*

385. *Id.*

386. See *id.*



Thus, under the facts presented, Listing Agent was not entitled to a commission.<sup>387</sup>

## VII. DEEDS AND TAX SALES, MORTGAGES, LIS PENDENS, AND PARTITION

### A. *Lis Pendens Damages*

This appeal arose out of a lis pendens, notice of which was filed by Buyer in connection with its suit against Sellers for specific performance of a contract for sale of a commercial building.<sup>388</sup> The trial judge required that Buyer post a lis pendens bond.<sup>389</sup> Sellers ultimately prevailed on the merits in the specific performance action.<sup>390</sup> Sellers then sought damages against the bond, including damages for lost rent and other expenses.<sup>391</sup> The trial court refused to award damages to Sellers because the value of the property had increased substantially during the period that the lis pendens was in effect.<sup>392</sup> The Third District Court of Appeal affirmed.<sup>393</sup> Damages would be appropriate only if the property had declined in value by the time the lis pendens was lifted.<sup>394</sup> With respect to the lost rent claim, the appellate court noted that when the lis pendens bond was ordered to be posted, the court ruled, without objection by Sellers, that Sellers would not be entitled to damages for lost rent given the lamentable condition of the building on the property—it was un-rentable.<sup>395</sup> Thus, it was not necessary to address what the measure of damages might have been for lost rent.<sup>396</sup> The appellate court found no other damages.<sup>397</sup>

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387. *Id.*

388. *Levin v. Lang*, 994 So. 2d 445, 445–46 (Fla. 3d Dist. Ct. App. 2008), *reh'g denied*, 13 So. 3d 468 (Fla. 2009) (unpublished table decision).

389. *Id.* at 446. The title search showed a substantial lien on the property which sellers did not pay. *Id.* at 445. Since the lis pendens was not based on a recorded instrument, the trial court had the discretion under section 48.23(3) of the *Florida Statutes* to require a lis pendens bond. *See* FLA. STAT. § 48.23(3) (2009); *Levin*, 994 So. 2d. at 446.

390. *Levin*, 994 So 2d. at 447. The trial court ruled in favor of Buyer in the underlying action, and Sellers appealed. *Id.* at 445–46. The Third District Court of Appeal reversed the trial court and directed that judgment be entered for Sellers. *Id.* at 447.

391. *Id.* at 446.

392. *Id.*

393. *Levin*, 994 So. 2d at 447.

394. *See id.* at 446–47.

395. *Id.* at 446.

396. *See id.*

397. *Levin*, 994 So. 2d at 447.

### B. *Wrongful Discharge of Lis Pendens Bond*

The Haven Center (Seller) and Mr. Meruelo (Buyer) entered into an agreement for the sale to Buyer of twenty-one acres of the Seller's real estate for \$10,500,000.<sup>398</sup> Disputes arose between the parties, and Buyer sued Seller in 2005, recording a lis pendens when he filed the complaint.<sup>399</sup> The trial court required that Buyer post a lis pendens bond in the amount of \$1,000,000 to cover any damages that might result from a wrongful filing of the lis pendens.<sup>400</sup> In 2008, Buyer asked the trial court for permission to "relinquish" the lis pendens, and if so permitted, that the lis pendens bond be discharged.<sup>401</sup> Buyer's motion was heard the day after notice of it was given.<sup>402</sup> No evidence was considered by the trial court, although the court did consider memoranda and legal argument by the parties.<sup>403</sup> The trial court granted Buyer's motion and directed the clerk of the circuit court to release the bond.<sup>404</sup> Seller successfully petitioned the Third District Court of Appeal for a writ of certiorari to quash the trial court's order.<sup>405</sup> The lis pendens was a cloud on Seller's title for almost three years.<sup>406</sup> The lis pendens bond not only protects the public, it also serves to protect the owner of property from damages that result from the filing and recording of a lis pendens by a party who then fails to prevail in the underlying action.<sup>407</sup> Voluntarily withdrawing the lis pendens does not automatically result in the discharge of the bond, especially when the conditions stated in the bond for its discharge have not been met.<sup>408</sup> Seller was entitled to a ruling by the court as to whether the recording of the lis pendens was proper, that is, that Buyer had prevailed regarding his alleged interests in the property.<sup>409</sup> If Buyer had not prevailed, then Seller was entitled to an opportunity to prove its damages that may be recovered under the bond.<sup>410</sup> The bond did not contain any provision that

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398. *Haven Ctr., Inc. v. Meruelo*, 995 So. 2d 1166, 1166 (Fla. 3d Dist. Ct. App. 2008) (per curiam).

399. *Id.* at 1166–67.

400. *Id.* at 1167. Seller sought discharge of the lis pendens, or alternatively, that a bond be required in the amount of \$1,000,000. *Id.*

401. *Id.*

402. *Haven Ctr., Inc.*, 995 So. 2d at 1167.

403. *Id.*

404. *Id.*

405. *Id.* at 1166.

406. *Id.* at 1167.

407. *See Haven Ctr., Inc.*, 995 So. 2d at 1167.

408. *Id.*

409. *Id.* at 1167–68.

410. *Id.* at 1168. The Third District Court, in dicta, briefly discussed what is ordinarily necessary to prove such damages. *Id.* The court said that "appraisal testimony or other evi-

made it conditional on the continued term of the lis pendens.<sup>411</sup> Furthermore, there is nothing in the applicable statute, section 48.23 of the *Florida Statutes*, or in the case law, that provides any such condition.<sup>412</sup>

### C. *Unrecorded Mortgage Assignment*

In *JP Morgan Chase v. New Millennial, L.C.*,<sup>413</sup> Mr. Jahren purchased real estate in Pinellas County and financed the transaction with money from two mortgage loans made to him by AmSouth.<sup>414</sup> The AmSouth mortgages were recorded in Pinellas County.<sup>415</sup> In 2004, AmSouth assigned the mortgages to JP Morgan Chase (JP Morgan).<sup>416</sup> JP Morgan did not record the assignment.<sup>417</sup> In 2006, Mr. Jahren and New Millennial entered into a sale and purchase agreement for the Pinellas County real estate, with Branch Banking & Trust Company financing New Millennial's purchase.<sup>418</sup> The title search performed on behalf of New Millennial disclosed the two recorded AmSouth mortgages but no satisfactions of them.<sup>419</sup> Chicago Title excepted the two mortgages from coverage, pending receipt of the cancelled mortgage notes and satisfactions.<sup>420</sup> New Millennial's closing agent telephoned AmSouth and was told by an unidentified employee that the two mortgages had been paid off and written confirmation would follow.<sup>421</sup> The "written confirmation" was a faxed form from AmSouth titled "Installment Loan Account Profile" which showed a loan "close date" of June 30, 2004 and a zero balance.<sup>422</sup> The Installment Loan Profile also stated "PD OFF."<sup>423</sup> The sale

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dence" of a decline in market value between the time of the recording of the lis pendens and the lifting of the lis pendens is required. *Haven Ctr., Inc.*, 995 So. 2d at 1167 (citing *Haisfield v. ACP Fla. Holdings, Inc.*, 629 So. 2d 963, 965–66 (Fla. 4th Dist. Ct. App. 1993)). The Third District, relying on *Haisfield*, also referred to "lost opportunities for a sale above a later market value." *Id.* This was not mentioned as a ground for recovering damages against a lis pendens bond in *Levin*, where the Third District Court of Appeal also relied on *Haisfield*. See *supra* text accompanying note 388.

411. *Haven Ctr., Inc.*, 995 So. 2d at 1167.

412. *Id.* Since this real property litigation was not based on a "duly recorded instrument," nor was "a statutory mechanics lien" involved, the lis pendens here was governed by the law governing injunctions. *Id.* (citing FLA. STAT. § 48.23(3) (2005)).

413. 6 So. 3d 681 (Fla. 2d Dist. Ct. App. 2009).

414. *Id.* at 683.

415. *Id.*

416. *Id.*

417. *Id.*

418. *JP Morgan Chase*, 6 So. 3d at 683.

419. *Id.*

420. *Id.* (alteration in original).

421. *Id.*

422. *Id.*

was completed, and JP Morgan, as the assignee of the mortgages, began foreclosure proceedings.<sup>424</sup> New Millennial and Branch Banking & Trust argued that the mortgages held by JP Morgan were unenforceable because JP Morgan had failed to record the assignments to them pursuant to section 701.02 of the *Florida Statutes*.<sup>425</sup> The trial court agreed and granted summary judgment in favor of New Millennial and Branch Banking & Trust.<sup>426</sup> The trial court also found that New Millennial was a subsequent purchaser for value without notice of the assignments of the mortgages to JP Morgan, and that Branch Banking & Trust was a subsequent creditor for value without notice of the assignments of the mortgages.<sup>427</sup> The Second District Court of Appeal reversed.<sup>428</sup> Noting that this was an issue of first impression, the Second District held that section 701.02 of the *Florida Statutes* was misapplied by the trial court.<sup>429</sup> This section does not operate to invalidate a mortgage.<sup>430</sup> Rather, it establishes the rights of competing mortgage assignees and purchasers.<sup>431</sup> In the example given by the court, “if the original mortgagee assign[ed] the mortgage to Entity A and Entity A fails to record that assignment, Entity A cannot claim priority over a latter assignee of the same mortgage (Entity B).”<sup>432</sup> The Second District determined that New Millennial and Branch Banking & Trust could not be without notice of the mortgages because the mortgages were a matter of public record.<sup>433</sup> The Second District also noted that the closing agent could have made written demand on AmSouth for a mortgage estoppel letter pursuant to section 701.04 of the *Florida Statutes*.<sup>434</sup> This would have uncovered the fact that the mortgages were outstanding.<sup>435</sup> Mr. Jahren did not claim otherwise.<sup>436</sup> The Installment Loan Profile sent in response to the closing agent’s oral inquiry is not an estoppel letter.<sup>437</sup> In addition, New Millennial could not be a purchaser in good faith because someone claiming under the mortgagor is not intended to be covered

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423. *JP Morgan Chase*, 6 So. 3d at 683.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 682–83.

428. *JP Morgan Chase*, 6 So. 3d at 688.

429. *Id.* at 684–85.

430. *See id.* at 685.

431. *Id.* (citing *Kapila v. Atl. Mortgage & Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1338 (11th Cir. 1999)).

432. *Id.*

433. *JP Morgan Chase*, 6 So. 3d at 686.

434. *Id.* at 687.

435. *See id.*

436. *See id.*

437. *Id.* at 687–88.

by section 701.02.<sup>438</sup> The Second District Court of Appeal said that “[w]e agree with . . . *In re Halabi* because its interpretation of the statute makes sense.”<sup>439</sup>

## VIII. EMINENT DOMAIN

### A. Computation of Business Damages

The Supreme Court of Florida, in *System Components Corp. v. Florida Department of Transportation*,<sup>440</sup> affirmed the decision of the Fifth District Court of Appeal,<sup>441</sup> thereby resolving a conflict between the Fifth District Court of Appeal in this case and the Fourth District Court of Appeal in *Department of Transportation v. Tire Centers, LLC*.<sup>442</sup> In *System Components Corp.*, the Florida Department of Transportation took by eminent domain, a part of the property owned by System Components Corporation (Corporation) that ran right through the middle of the property in order to widen a road.<sup>443</sup> Corporation relocated and continued its business.<sup>444</sup> Corporation was entitled to business damages resulting from the taking, and the jury, using an income valuation approach, determined gross business damages in the amount of \$2,394,964.<sup>445</sup> The jury calculated net business damages at \$1,347,911 which was the amount of the award to Corporation.<sup>446</sup> In reaching the \$1,347,911 figure, the jury took into consideration the fact that Corporation continued its business.<sup>447</sup> Corporation appealed the verdict, relying on the *Department of Transportation v. Tire Centers, LLC* decision.<sup>448</sup> The Fourth District Court of Appeal there determined that business damages called for by section 73.071(3)(b) of the *Florida Statutes* must be determined without reduction or mitigation by reason of the property owner’s relocation

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438. *JP Morgan Chase*, 6 So. 3d at 685–86 (citing *Kapila v. Atl. Mortgage & Inv. Corp.* (*In re Halabi*), 184 F.3d 1335, 1338 (11th Cir. 1999)).

439. *Id.* at 685.

440. 14 So. 3d 967 (Fla. 2009).

441. *Id.* at 985; *Sys. Components Corp. v. Dep’t of Transp. (Sys. Components Corp. I)*, 985 So. 2d 687, 693 (Fla. 5th Dist. Ct. App. 2008), *reh’g granted*, 990 So. 2d 1060 (Fla. 2008).

442. 895 So. 2d 1110 (Fla. 4th Dist. Ct. App. 2005); *see Landau, 2007–2008 Survey, supra* note 120, at 109–10.

443. *Sys. Components Corp. II*, 14 So. 3d at 971.

444. *Id.* at 972–73.

445. *Id.* at 974.

446. *Id.*

447. *Id.*

448. *Sys. Components Corp. II*, 14 So. 3d at 974.

and continuation of the business being valued.<sup>449</sup> That is, business damages would be determined as though the business ceased to exist on the date of the eminent domain taking.<sup>450</sup> The Fifth District Court of Appeal disagreed with the Fourth District, and certified conflict to the Supreme Court of Florida.<sup>451</sup> The Supreme Court provided a brief history of eminent domain proceedings in Florida pointedly noting that compensating a property owner for the taking of real estate is constitutionally required, but that is not so with respect to providing compensation to the owner for lost business profits.<sup>452</sup> The Court also noted that while severance damages reimburse the property owner for the reduction in value that the eminent domain taking causes to any remaining land of the property owner, business damages compensate the owner for probable reductions in business value, business losses, and increased business expenses caused by the taking.<sup>453</sup> Lost profits and business opportunities are intangible assets, not real property.<sup>454</sup> Business damage awards are “a matter of legislative grace,”<sup>455</sup> unless the government takes the business itself in which case compensation is required.<sup>456</sup> Business damage provisions are to be narrowly construed and are available only if:

a partial taking occurs; the condemnor is a state or local “public body;” the land is taken to construct . . . a right-of-way; the taking damages or destroys an established business, which has existed on the parent tract for [five years]; the business owner owns the condemned and adjoining land . . . ; business was conducted on the condemned land and the adjoining remainder; and the [property owner] specifically pleads and proves [all of the foregoing elements].<sup>457</sup>

The Court concluded that adopting the Fourth District’s reasoning would provide an undeserved windfall to the business owner who relocates

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449. *See id.*

450. *Id.* at 975.

451. *See id.*

452. *Id.* at 975–76.

453. *Sys. Components Corp. II*, 14 So. 3d at 976–77.

454. *Id.* at 976 (quoting *Jamesson v. Downtown Dev. Auth. of Fort Lauderdale*, 322 So. 2d 510, 511 (Fla. 1975)).

455. *Id.* (quoting *Jamesson*, 322 So. 2d at 511).

456. *Id.*

457. *Id.* at 978 (citing FLA. STAT. § 73.071(3)(b)(2009)). The five year requirement applies for takings on or after January 1, 2005. FLA. STAT. § 73.071(3)(b). For takings before January 1, 2005, the required period was four years. *Id.*

and continues in business.<sup>458</sup> However, the Court refused to impose an affirmative duty on a property owner to reduce damages by relocating and continuing business.<sup>459</sup> That, it said, was the province of the legislature.<sup>460</sup>

### B. *Public Purpose and Reasonable Necessity*

The City of Lakeland (the City), located in Polk County (the County), took property by eminent domain for a right-of-way that would allow for a road extension.<sup>461</sup> The property that was subject to the trial court's orders of taking was County—not City—property, and the property was not “contiguous to the City's boundaries.”<sup>462</sup> The road project, however, was only a short distance east of an area undergoing development that was within the City's boundaries.<sup>463</sup> The property owners appealed, and the Second District Court of Appeal affirmed, noting that the eminent domain power of the State of Florida was delegated to the City not only in the City's charter, but also by section 166.411(3) of the *Florida Statutes*.<sup>464</sup> The Second District concluded that the delegation was broad enough to allow a taking outside the City boundary.<sup>465</sup> The appellate court noted that in *Prosser v. Polk County*,<sup>466</sup> where Hillsborough County did not object, Polk County was allowed to take land in adjacent Hillsborough County.<sup>467</sup> Similarly, here, there was no objection by the County to the City's taking of County land.<sup>468</sup> The appellate court observed that the City also relied on a 2003 interlocal agreement with the County that recognized the need for the road project, and the County had agreed to finance part of the project.<sup>469</sup> In light of this agreement, the appellate court found that the City had met its burden of demonstrating “a public purpose and a reasonable necessity,” and it was not necessary that the City

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458. *Sys. Components Corp. II*, 14 So. 3d at 981 (citing *Sys. Components Corp. v. Dep't of Transp. (Sys. Components Corp. I)*, 985 So. 2d 687, 690 (Fla. 5th Dist. Ct. App. 2008), *reh'g granted*, 990 So. 2d 1060 (Fla. 2008)).

459. *Id.* at 985.

460. *Id.*

461. *Kirkland v. City of Lakeland*, 3 So. 3d 398, 399 (Fla. 2d Dist. Ct. App. 2009).

462. *Id.*

463. *Id.*

464. *Id.* at 400.

465. *Id.*

466. 545 So. 2d 934 (Fla. 2d Dist. Ct. App. 1989) (*per curiam*).

467. *Kirkland*, 3 So. 3d at 400 (citing *Prosser*, 545 So. 2d at 934).

468. *Id.*

469. *Id.* Part of the funding was provided by the Florida Department of Transportation, with the City and the County agreeing to split the balance of the cost. *Id.*

demonstrate “a public purpose that was exclusively or even primarily a municipal purpose of the City” rather than both entities.<sup>470</sup>

### C. *Inverse Condemnation*

In *Drake v. Walton County*,<sup>471</sup> the property owners bought their Walton County (the County) property in 1992.<sup>472</sup> Before then, the upper part of the property had been subjected to an overflow of water from Oyster Lake.<sup>473</sup> The outflow was stabilized in 1988 with assistance from the State.<sup>474</sup> There was no overflow of water across this part of the property after the stabilization, at least not until 1995.<sup>475</sup> Thus, after the stabilization, this part of the property could be developed, and it was during this period that the property owners purchased the property.<sup>476</sup> However, in 1995, following a hurricane, the County diverted lake water across the property.<sup>477</sup> Between 1996 and 1999, the County tried unsuccessfully to assist in directing the lake water overflow away from the property.<sup>478</sup> The overflow was stopped in 2004, but in 2005, under emergency conditions, the County again diverted overflow water across the upper section of the property.<sup>479</sup> This was done “to protect a neighbor’s home and property.”<sup>480</sup> The property owner brought an action against the County for inverse condemnation.<sup>481</sup> The trial court found that the County had merely restored the natural drainage pattern and was responding to emergency conditions pursuant to section 252.43(6) of the *Florida Statutes*.<sup>482</sup> The First District Court of Appeal reversed.<sup>483</sup> In ruling for the property owners, the First District found that the “critical undisputed fact” was that four years before the 1992 purchase of the property by property owners, overflow had been stabilized—with the help of the State of Flori-

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470. *Id.*

471. 6 So. 3d 717 (Fla. 1st Dist. Ct. App. 2009).

472. *Id.* at 719.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Drake*, 6 So. 3d at 719.

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. *Drake*, 6 So. 3d at 719. There were claims for trespass and negligence as well. *Id.* at 719 n.1. The property owners appealed the trial court’s ruling in favor of the County on these claims, and the First District affirmed the trial court. *Id.* at 719, 722.

482. *Id.* at 719–20.

483. *Id.* at 722.



da—and was no longer crossing the property.<sup>484</sup> The overflow drainage onto the property resulted from the County's actions in 1995 and 2005.<sup>485</sup> The hurricane and other emergencies did not flood the property.<sup>486</sup> It was "the County's action in response to the hurricane that caused the flooding" on the property.<sup>487</sup> The property owners "could reasonably rely on the drainage pattern" set in 1988.<sup>488</sup> When the pattern was changed by the County, there was a taking.<sup>489</sup> Even if the County acted in the face of an emergency pursuant to section 252.43(6) of the *Florida Statutes*, that does not prevent the successful prosecution of an inverse condemnation proceeding.<sup>490</sup> Judge Barfield dissented.<sup>491</sup> According to the dissent, the facts were distinguishable from the cases cited by the majority, and the majority never explained how the County's actions "somehow resulted in a 'taking' of the subject property."<sup>492</sup> Judge Barfield said that "[t]o allow the plaintiff to recover" from the County based on the facts presented "is, in my opinion, a travesty of justice and a clear departure from well-settled law."<sup>493</sup>

## IX. EMPLOYMENT LAW

### A. *Non-Compete Agreements*

In *Fiberglass Coatings, Inc. v. Interstate Chemical, Inc.*,<sup>494</sup> the employment contract between Robert Hutchens (Former Employee) and Fiberglass Coatings, Inc. (Former Employer) contained a non-compete clause.<sup>495</sup> Former Employee, a salesperson for Former Employer, was prohibited by the non-compete clause from working in Florida for a competitor of Former Employer during the one year following the end of his employment, which employment ended in March 2002.<sup>496</sup> Within weeks after leaving the employ of

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484. *Drake*, 6 So. 3d at 720.

485. *See id.* at 719.

486. *Id.* at 720.

487. *Id.*

488. *Id.*

489. *Drake*, 6 So. 3d at 720 (citing *Schick v. Fla. Dep't of Agric.*, 504 So. 2d 1318, 1320 (Fla. 1st Dist. Ct. App. 1987)); *see also* *Martin v. City of Monticello*, 632 So. 2d 236, 237 (Fla. 1st Dist. Ct. App. 1994); *Leon County v. Smith*, 397 So. 2d 362, 364 (Fla. 1st Dist. Ct. App. 1981).

490. *Drake*, 6 So. 3d at 721–22.

491. *Id.* at 722 (Barfield, J., dissenting).

492. *Id.* at 725.

493. *Id.*

494. 16 So. 3d 836 (Fla. 2d Dist. Ct. App. 2009).

495. *Id.* at 837.

496. *Id.*

Former Employer, Former Employee went to work for a short time for Polymeric, a fiberglass competitor.<sup>497</sup> Then, in September 2002, Former Employee went to work as a salesperson for Interstate Chemical, Inc. (New Employer), another competitor of Former Employer.<sup>498</sup> In January 2004, Former Employer sued New Employer alleging that New Employer had “tortiously interfered with the restrictive covenant.”<sup>499</sup> Former Employer asserted two theories for the interference: “a ‘solicitation of customers’ theory and an ‘employment’ theory.”<sup>500</sup> The trial court granted New Employer’s motion for summary judgment, agreeing with New Employer’s argument that, as a matter of law, New Employer could not be liable for inducing or causing Former Employee’s breach because Former Employee “was predisposed to breach” the non-compete clause, as demonstrated by Former Employee’s previous employment for Polymeric.<sup>501</sup> Former Employer appealed.<sup>502</sup> The Second District affirmed on the “employment” theory.<sup>503</sup> In order to establish liability for tortious interference on this theory, it is necessary to establish causation.<sup>504</sup> In order to establish causation, Former Employer would have had to show that New Employer “‘intended to procure a breach of the contract.’”<sup>505</sup> Relying on the Restatement (Second) of Torts, as quoted by the Fourth District Court of Appeal in *Martin Petroleum Corp. v. Amerada Hess Corp.*,<sup>506</sup> the Second District concluded that the mere hiring of Former Employee during the non-compete period did not amount to tortious interference.<sup>507</sup> This would have been so even if the new employment agreement was entered into with New Employer’s knowledge that Former Employee could not work for New Employer and, at the same time, honor his promise not to compete with Former Employer.<sup>508</sup> However, it was not appropriate to grant summary judgment in favor of New Employer on the “solicitation of customers” theory of tortious interference.<sup>509</sup> There was “direct and circumstantial evidence” in the record that could result in findings of fact by which

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497. *Id.*

498. *Id.* at 837–38.

499. *Fiberglass Coatings, Inc.*, 16 So. 3d at 838.

500. *Id.*

501. *Id.*

502. *Id.*

503. *Id.*

504. *Fiberglass Coatings, Inc.*, 16 So. 3d at 838.

505. *Id.* (quoting *Chi. Title Ins. Co. v. Alday-Donalson Title Co. of Fla.*, 832 So. 2d 810, 814 (Fla. 2d Dist. Ct. App. 2002)).

506. 769 So. 2d 1105 (Fla. 4th Dist. Ct. App. 2000).

507. See *Fiberglass Coatings, Inc.*, 16 So. 3d at 838 (citing *Martin Petroleum Corp.*, 769 So. 2d at 1107).

508. *Id.*

509. *Id.* at 839.

New Employer could be held liable for tortious interference on the “solicitation of customers” theory.<sup>510</sup>

**B. Enjoining Violation of Non-Compete Agreement: Ex Parte Order**

Mr. Bookall (Former Employee), who had signed a covenant not to compete with Sunbelt Rentals, Inc. (Former Employer), resigned and went to work for a competitor (New Employer).<sup>511</sup> After finding out about Former Employee’s new job, Former Employer advised Former Employee that it considered his actions a breach of the agreement.<sup>512</sup> Former Employee did not terminate his new employment, despite written assurances from Former Employee’s lawyer that there would be compliance with the non-compete agreement.<sup>513</sup> Former Employer proceeded ex parte to obtain a temporary injunction against Former Employee and New Employer.<sup>514</sup> The Fourth District Court of Appeal reversed the trial court’s order that granted the request for an injunction.<sup>515</sup> The trial court’s order was insufficient because it did not comply with all the requirements of rule 1.610(a) of the *Florida Rules of Civil Procedure*.<sup>516</sup> Before an ex parte temporary injunction may be issued, the rule requires that the moving party allege specific facts showing irreparable and immediate injury absent the injunction, and that the movant’s attorney provide a written certification as to the reasons for not requiring notice.<sup>517</sup> The trial court’s order granting the injunction must state what the injury would be, explain why it “may be irreparable,” and list the reasons for not having required notice.<sup>518</sup> The trial court’s order was defective in failing to state those reasons.<sup>519</sup> The Fourth District Court of Appeal cited the Second District Court of Appeal’s decision in *Lewis v. Sunbelt Rentals, Inc.*<sup>520</sup> and the First District Court of Appeal’s decision in *Soud v. Kendale, Inc.*<sup>521</sup> when it stated that this omission would not have invalidated the order

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510. *Id.*

511. *Bookall v. Sunbelt Rentals, Inc.*, 995 So. 2d 1116, 1116 (Fla. 4th Dist. Ct. App. 2008).

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.* at 1118.

516. *Bookall*, 995 So. 2d at 1117.

517. *Id.* (citing FLA. R. CIV. P. 1.610(a)(1)–(2)). If notice was attempted, the attorney must certify what the efforts were to give notice. *Id.*

518. *Id.* (citing FLA. R. CIV. P. 1.610(a)(2)).

519. *Id.*; see FLA. R. CIV. P. 1.610(a)(2).

520. 949 So. 2d 1114 (Fla. 2d Dist. Ct. App. 2007).

521. 788 So. 2d 1051 (Fla. 1st Dist. Ct. App. 2001).

had the complaint or motion explained why the order should be entered without notice, as this would have substituted for the statement in the order.<sup>522</sup> Former Employer did not do so.<sup>523</sup>

### C. *Employment Discrimination*

Ms. Carsillo (Employee) was a firefighter/paramedic employed by the City of Lake Worth (City).<sup>524</sup> When Employee became pregnant, she requested a light duty assignment.<sup>525</sup> Although she requested to be assigned to the fire department, she was assigned elsewhere.<sup>526</sup> She objected, but ultimately she proceeded with the light duty assignments in those other departments.<sup>527</sup> Employee sued the City under the Florida Civil Rights Act (FCRA), sections 760.01–.10 of the *Florida Statutes*, claiming discrimination.<sup>528</sup> Her allegation of discrimination was based on light duty assignments at the fire department for other employees who had “physical restrictions.”<sup>529</sup> The trial court entered summary judgment in favor of the City concluding that the FCRA does not address “discrimination based on pregnancy,” although it covers discrimination based on sex.<sup>530</sup> The Fourth District Court of Appeal reversed, holding that discrimination based on pregnancy is sex discrimination.<sup>531</sup> The appellate court said that “if a Florida statute is patterned after a federal law, the Florida statute will be given the same construction as the federal courts give the federal act.”<sup>532</sup> The court then noted that the provision at issue in the FCRA was “identical to the Civil Rights Act of 1964, as amended.”<sup>533</sup> The pertinent “identical” provision of the federal Civil Rights Act of 1964, as quoted by the appellate court, does not, as Florida does not, list pregnancy.<sup>534</sup> However, that provision of the Civil Rights Act of 1964

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522. *Bookall*, 995 So. 2d at 1118; see *Lewis*, 949 So. 2d at 1115; *Soud*, 788 So. 2d at 1053.

523. *Bookall*, 995 So. 2d at 1118.

524. *Carsillo v. City of Lake Worth*, 995 So. 2d 1118, 1119 (Fla. 4th Dist. Ct. App. 2008).

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Carsillo*, 995 So. 2d at 1119.

530. *Id.*

531. *Id.* at 1119, 1121.

532. *Id.* at 1119 (citing *State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995)).

533. *Id.*

534. *Carsillo*, 995 So. 2d at 1119. The Pregnancy Discrimination Act of 1978 was said to have been a legislative response to the five-four decision of the United States Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125, 125–126 (1976), where the Court held that an employer did not violate the federal Civil Rights Act even though its disability insurance

was amended by the enactment of the Pregnancy Discrimination Act of 1978 to include employment discrimination based on pregnancy as prohibited discrimination based on sex.<sup>535</sup> The FCRA, however, has not been amended.<sup>536</sup> The Fourth District Court of Appeal, after reviewing the federal pre-emption analysis as applied by the First District Court of Appeal in *O'Loughlin v. Pinchback*,<sup>537</sup> as well as federal court decisions where relief has been sought—and denied—under the FCRA, concluded that the appellate court was required to consider the later amendment of the federal law.<sup>538</sup> The Fourth District Court of Appeal “‘had the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation,’” and held that under the FCRA, sex discrimination includes discrimination based on pregnancy.<sup>539</sup>

#### X. INJUNCTIVE RELIEF

The next case, *Attorney's Title Insurance Fund, Inc. v. M. I. Industries USA, Inc. (M.I. Industries USA, Inc. II)*,<sup>540</sup> is a case to watch, as the Supreme Court of Florida has accepted jurisdiction to review the decision of the Fourth District Court of Appeal in *M.I. Industries U.S.A, Inc. v. Attorneys' Title Insurance Fund, Inc. (M.I. Industries USA, Inc. I)*.<sup>541</sup> Attorneys' Title Insurance Fund, Inc. (the Fund) obtained an *ex parte* order enjoining M.I. Industries USA, Inc. (M.I. Industries) from transferring or withdrawing funds from its bank accounts and from disposing of other assets.<sup>542</sup> The underlying allegations were that M.I. Industries was involved in illegal real estate schemes, and that profits from these land schemes were moved through a

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did not provide coverage for disability that arose from pregnancy. *Id.* at 125. (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (overruling *Gilbert*)).

535. *Carsillo*, 995 So. 2d at 1119.

536. *Id.* at 1120.

537. 579 So. 2d 788 (Fla. 1st Dist. Ct. App. 1991). In *O'Loughlin*, a pregnancy discrimination suit seeking back pay, the First District Court of Appeal held that where Florida law provides “less protection to its citizens than does the corresponding federal law,” so that Florida law is “‘an obstacle to the accomplishment’” of the objectives of the U.S. Congress, the Florida statute will be deemed pre-empted by the federal statute to that extent. *Id.* at 792 (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987)).

538. *Carsillo*, 995 So. 2d at 1120–21.

539. *Id.* (quoting *Gay v. Canada Dry Bottling Co. of Fla.*, 59 So. 2d 788, 790 (Fla. 1952)).

540. 10 So. 3d 1100 (Fla. 2009) (unpublished table decision).

541. 6 So. 3d 627 (Fla. 4th Dist. Ct. App. 2009), *cert. granted*, 10 So. 3d 1100 (Fla. 2009) (unpublished table decision).

542. *Id.* at 628.

member-agent's attorney trust fund to the M.I. accounts.<sup>543</sup> The trial judge denied the request of M.I. Industries for dissolution of the injunction, although some assets were released from the injunction.<sup>544</sup> M.I. Industries appealed and the Fund cross-appealed as to the release of those assets and an increase of the injunction bond amount.<sup>545</sup> The Fourth District Court of Appeal held that the general rule is that, in an action for damages, it is improper to issue an injunction freezing a bank account since damages will suffice, even if the money in the account is lost.<sup>546</sup> The appellate court noted that the fact that money damages may be uncollectible does not change the result.<sup>547</sup> However, the appellate court acknowledged that there is an exception when the injunction serves "to protect the res of a trust" while litigation is pending.<sup>548</sup> Thus, had the alleged profits from the scheme "remained specifically identifiable in the member-agent's attorney's trust account, then the injunction may have been proper."<sup>549</sup> The Fourth District Court of Appeal said that because "the Fund expressly sought damages in its complaint . . . for unjust enrichment," money damages would be sufficient to compensate the Fund.<sup>550</sup> The Fourth District concluded that it was "improper to enter an injunction preventing a party from using or disposing of its assets prior to the conclusion of a *legal* action."<sup>551</sup>

While the appellate court did not, in its original opinion, specifically state that the Fund's unjust enrichment claim was not an equitable action, it did appear to conclude that the Fund's action was a legal action for which there was an adequate remedy at law.<sup>552</sup> On the Fund's motion for rehearing, which the Fourth District Court denied, the Fund asserted that the Fourth District Court of Appeal had previously recognized the claim of unjust enrichment "in causes of action based in law and equity."<sup>553</sup> The Fourth District disagreed stating, "[t]o the contrary, this court has squarely held that an

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543. *Id.*

544. *Id.*

545. *Id.*

546. *M.I. Indus. USA, Inc. I*, 6 So. 3d at 628–29 (citing *Hiles v. Auto Bahn Fed'n, Inc.*, 498 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1986)).

547. *Id.* at 629 (citing *Weinstein v. Aisenberg*, 758 So. 2d 705, 706 (Fla. 4th Dist. Ct. App. 2000) (per curiam)).

548. *Id.*

549. *Id.*

550. *Id.*

551. *M.I. Indus. USA, Inc. I*, 6 So. 3d at 629 (emphasis added) (citing *Briceño v. Bryden Invs., Ltd.*, 973 So. 2d 614, 616 (Fla. 3d Dist. Ct. App. 2008)).

552. *See id.*

553. *Id.*

action for unjust enrichment is an action at law.”<sup>554</sup> The court, however, recognized that this position, including “the current definition of ‘no adequate remedy at law,’ can result in an injustice in a case such as this one,”<sup>555</sup> citing the concurring opinion in the decision of another panel of the Fourth District Court of Appeal in *Weinstein v. Aisenberg*.<sup>556</sup>

The court then went on to certify the following question to the Supreme Court of Florida as one of great public importance,

INCIDENT TO AN ACTION AT LAW, MAY A TRIAL COURT  
ISSUE AN INJUNCTION TO FREEZE ASSETS OF A  
DEFENDANT, WHERE THE PLAINTIFF HAS DEMON-  
STRATED: (1) [THAT] DEFENDANT WILL TRANSFER, DIS-  
SIPATE, OR HIDE HIS/HER ASSETS SO AS TO RENDER A  
TRIAL JUDGMENT UNENFORCEABLE; (2) A CLEAR  
LEGAL RIGHT TO THE RELIEF REQUESTED; (3) A  
SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE ME-  
RITS; AND (4) A TEMPORARY INJUNCTION WILL SERVE  
THE PUBLIC INTEREST?<sup>557</sup>

Although not expressly asked to do so, perhaps the Court will take this opportunity to clarify the nature of an action alleging unjust enrichment<sup>558</sup> as there appears to be some difference of opinion.<sup>559</sup> For example, in *Brace v. Comfort*, discussed earlier in this article,<sup>560</sup> the Second District Court of Appeal characterized a claim of unjust enrichment as an equitable claim.<sup>561</sup>

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554. *Id.* (citing *Commerce P’ship 8098 Ltd. P’ship v. Equity Contracting Co.*, 695 So. 2d 383, 386–87 (Fla. 4th Dist. Ct. App. 1997)).

555. *Id.* (citing *Weinstein v. Aisenberg*, 758 So. 2d 705, 711–12 (Fla. 4th Dist. Ct. App. 2000) (Gross, J., concurring)).

556. 758 So. 2d 705 (Fla. 4th Dist. Ct. App. 2000) (per curiam).

557. *M.I. Indus. USA, Inc.*, 6 So. 3d at 629.

558. See, for example, *Jews for Jesus, Inc. v. Rapp* where the Court was asked to determine whether Florida recognized the tort of false light invasion of privacy. 997 So. 2d 1098, 1100 (Fla. 2008). After answering no to the certified question, the Court went on to address the defamation rule under section 559 of the Restatement (Second) of Torts. *Id.*; see also Landau, 2007–2008 Survey, *supra* note 120, at 129–30.

559. See *Brace v. Comfort*, 2 So. 3d 1007, 1011 (Fla. 2d Dist. Ct. App. 2008).

560. See *supra* text accompanying notes 312–26.

561. *Brace*, 2 So. 3d at 1011.

## XI. JURISDICTION, VENUE, FORUM NON CONVENIENS, AND STANDING

A. *Personal Jurisdiction: Conferred by Contract*

In *Jetbroadband WV, LLC v. MasTec North America, Inc.*,<sup>562</sup> the Third District Court of Appeal was called upon to determine, as “an issue of first impression,” if the parties’ consent to a contract provision could, in and of itself, confer jurisdiction on a Florida court over two Delaware limited liability companies under sections 685.101 and 685.102 of the *Florida Statutes*.<sup>563</sup> MasTec North America, Inc. (Florida Corporation) contracted with Jetbroadband WV, LLC and Jetbroadband VA, LLC (Delaware LLCs) to perform certain services for Delaware LLCs in Virginia.<sup>564</sup> Delaware LLCs had their principal places of business in New York.<sup>565</sup> The contract clause at issue provided that the parties “irrevocably agree and submit to the exclusive jurisdiction of the Circuit Court, Eleventh Judicial Circuit, Miami.”<sup>566</sup> The clause also contained a choice of law provision, choosing Florida law as the governing law.<sup>567</sup> A disagreement between the parties led Florida Corporation to sue Delaware LLCs in Miami-Dade County.<sup>568</sup> Delaware LLCs took the position that the trial court did not have personal jurisdiction over them, but the trial court disagreed, and their motion to dismiss was denied.<sup>569</sup> The Third District Court of Appeal affirmed the trial court.<sup>570</sup> The appellate court acknowledged that the Supreme Court of Florida, in *McRae v. J.D./M.D., Inc.*,<sup>571</sup> held that an agreement alone is not enough to “confer personal jurisdiction on Florida courts.”<sup>572</sup> However, the Supreme Court of Florida’s *McRae* decision in 1987 was rendered in the context of section 48.193 of the *Florida Statutes*, Florida’s traditional basis for long-arm statute jurisdiction.<sup>573</sup> Two years later, however, sections 685.101 and 685.102 of the *Florida Statutes* were enacted.<sup>574</sup> These provisions of the Contract Enforcement Chapter of the Commercial Relations Title are entitled “Choice of Law” and

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562. 13 So. 3d 159 (Fla. 3d Dist. Ct. App. 2009).

563. *Id.* at 160.

564. *Id.* at 160–61.

565. *Id.* at 161 n.1.

566. *Id.* at 161.

567. *Jetbroadband WV, LLC*, 13 So. 3d at 161.

568. *Id.*

569. *Id.*

570. *Id.* at 163.

571. 511 So. 2d 540 (Fla. 1987).

572. *Jetbroadband WV, LLC*, 13 So. 3d at 161 (citing *McRae*, 511 So. 2d at 542).

573. *Id.* (quoting *McRae*, 511 So. 2d at 543); see FLA. STAT. § 48.193 (2009).

574. *Jetbroadband WV, LLC*, 13 So. 3d at 161.



“Jurisdiction,” respectively.<sup>575</sup> Under these sections, personal jurisdiction can be conferred on Florida courts by a contract provision, provided several requirements are satisfied.<sup>576</sup> The agreement at issue must contain both a Florida choice of law clause, pursuant to section 685.101 of the *Florida Statutes*, and a clause by which the non-resident agrees to submit to the Florida court’s jurisdiction.<sup>577</sup> In addition, the agreement must involve consideration in the aggregate amount of at least \$250,000; and then, if bringing the action in Florida is not in violation of the United States Constitution and “‘bears a substantial or reasonable relation to Florida, or . . . at least one of the parties is either a resident or citizen of Florida . . . or is incorporated or organized under the laws of Florida’” the parties can, by the provision, confer jurisdiction on the Florida court.<sup>578</sup> The facts of this case satisfied the five part test.<sup>579</sup> The Third District Court of Appeal also observed that while the due process minimum contacts with the forum state test—the “not in violation of the United States Constitution” part of the test—must be met “in the commercial context,” the choice of law clause itself satisfies the due process minimum contacts requirement, provided it “is ‘freely negotiated’ and is not ‘unreasonable and unjust.’”<sup>580</sup>

#### B. *Personal Jurisdiction: Contracts Cases and Burden of Proof*

Club & Community Corporation (Florida Corporation) sued Hampton Island Preservation, LLC (Georgia LLC) in the Palm Beach County Circuit Court for breach of contract.<sup>581</sup> After Georgia LLC’s motions to dismiss Florida Corporation’s complaint and first amended complaint for lack of personal jurisdiction under Florida’s long-arm statute were granted by the

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575. *Id.* at 161–62; see FLA. STAT. §§ 685.101–.102 (2009).

576. *Jetbroadband WV, LLC*, 13 So. 3d at 161–62. The court broke these down into five requirements and numbered them accordingly. *Id.* at 162.

577. *Id.*

578. *Id.* at 161–62 (quoting Edward M. Mullins & Douglas J. Giuliano, *Contractual Waiver of Personal Jurisdiction Under F.S. § 685.102: The Long-Arm Statute’s Little-Known Cousin*, 80 FLA. B.J. 36, 36–37 (May 2006)).

579. *Id.* at 163.

580. *Jetbroadband WV, LLC*, 13 So. 3d at 163 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)); see also *Desai Patel Sharma, Ltd. v. Don Bell Indus., Inc.*, 729 So. 2d 453, 454 (Fla. 5th Dist. Ct. App. 1999).

581. *Hampton Island Pres., LLC v. Club & Cmty. Corp.*, 998 So. 2d 665, 666–67 (Fla. 4th Dist. Ct. App. 2009). There was also a claim based on quantum meruit, a claim alleging unjust enrichment, and a claim of gross negligence. *Id.* at 667. The portion of the Florida long-arm statute that is based on tortious conduct occurring in the state, section 48.193 of the *Florida Statutes*, was not mentioned in the court’s opinion.

trial court, Florida Corporation filed a second amended complaint.<sup>582</sup> Georgia LLC again filed a motion to dismiss, but this time the trial court denied the motion.<sup>583</sup> Georgia LLC appealed, and the Fourth District Court of Appeal reversed.<sup>584</sup> Although the appellate court discussed the two-part test of *Venetian Salami Co. v. Parthenais*,<sup>585</sup> its decision focused on burden of proof.<sup>586</sup> A defendant must file affidavits in support of its motion to dismiss for lack of jurisdiction.<sup>587</sup> The burden then shifts back to the plaintiff who must file “opposing affidavits or other evidence.”<sup>588</sup> With respect to the first statutory prong of the *Venetian Salami Co.* test, the Fourth District noted that Florida Corporation alleged in its second amended complaint that under the parties’ agreement, “all payments were required to be made and were made in Palm Beach County.”<sup>589</sup> Florida, as the place of payment with respect to a contract with a Florida resident, has previously been recognized by the Fourth District Court of Appeal as a sufficient jurisdictional fact.<sup>590</sup> There was no opposing affidavit filed by Georgia LLC to contest this allegation.<sup>591</sup> However, as to minimum contacts, the second prong of the *Venetian Salami Co.* test, Florida Corporation relied on an unsigned copy of an “Agreement for Professional Services”, which contained a forum selection clause stating that the Agreement was governed by the laws of Florida.<sup>592</sup> Georgia LLC filed an affidavit of its manager, who stated that he had no knowledge of the Agreement for Professional Services ever having been signed by “any authorized representative” of Georgia LLC.<sup>593</sup> No opposing affidavit was filed by Florida Corporation.<sup>594</sup> Thus, the defendant submitted an affidavit contesting

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582. *Id.* at 666.

583. *Id.* at 667.

584. *Hampton Island Pres., LLC*, 998 So. 2d at 668.

585. 554 So. 2d 499 (Fla. 1989). The two part test includes the question of whether first, there are sufficient jurisdictional facts alleged for purposes of section 48.193(1)(g) of the *Florida Statutes*. See *id.* at 502. If the answer is yes, the second part examines the due process requirement that the defendant have sufficient minimum contacts with Florida. *Id.*

586. *Hampton Island Pres., LLC*, 998 So. 2d at 667.

587. *Id.*

588. *Id.* (citing *Becker v. Hooshmand*, 841 So. 2d 561, 562 (Fla. 4th Dist. Ct. App. 2003)).

589. *Id.*

590. *Id.* at 668 (quoting *Woodard Chevrolet, Inc. v. Taylor Corp.*, 949 So. 2d 268, 270 (Fla. 4th Dist. Ct. App. 2007)). The Fourth District Court of Appeal in *Woodard* concluded that under the second prong of the *Venetian* test, there were not sufficient minimum contacts to justify *Woodard* being haled into the Florida courts. *Woodard*, 949 So. 2d at 270; see Barbara Landau, 2006-2007 *Survey of Florida Law Affecting Business Owners*, 32 NOVA L. REV. 21, 86-87 (2007) [hereinafter Landau, 2006-2007 *Survey*].

591. *Hampton Island Pres., LLC*, 998 So. 2d at 668.

592. *Id.* at 667.

593. *Id.* at 668.

594. *Id.*

minimum contacts, but the plaintiff did not submit the required opposing affidavit to establish minimum contacts.<sup>595</sup> The appellate court did note, in dicta, that under *McRae*, even if the Agreement for Professional Services had been signed, “a forum selection clause, designating Florida as the forum, cannot operate as the sole basis for Florida to exercise personal jurisdiction over an objecting non-resident defendant.”<sup>596</sup>

In light of the Third District Court of Appeal’s ruling on the minimum contacts issue in its *Jetbroadband* decision, albeit a decision under sections 685.101 and 685.102, rather than section 48.193 of the *Florida Statutes*, and the Fifth District Court of Appeal’s decision in *Desai Patel Sharma, Ltd. v. Don Bell Industries, Inc.*,<sup>597</sup> cited in *Jetbroadband*, it appears that there is a question as to whether, in the context of section 48.193, a signed jurisdiction agreement can ever meet the minimum contacts constitutional prong under *Venetian Salami Co.*, or whether it only did so under section 685.102 when considered together with the other requirements of that section.<sup>598</sup>

### C. *Personal Jurisdiction: Corporate Shield Doctrine*

Mr. Rensin (Nonresident) was the CEO of a Maryland and a Virginia limited liability company (LLCs).<sup>599</sup> The LLCs and Nonresident, individually, were sued by the Attorney General, on behalf of the State of Florida (State) for alleged violations of Florida’s Deceptive and Unfair Trade Practices Act and its Retail Installment Sales Act.<sup>600</sup> These claims arose out of the sale of electronics, including computers, to Florida customers.<sup>601</sup> The State claimed personal jurisdiction over Mr. Rensin, individually, under Florida’s long-arm statute, section 48.193 of the *Florida Statutes*, and the trial

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595. *See id.*

596. *Hampton Island Pres., LLC*, 998 So. 2d at 668 (quoting *McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 542 (Fla. 1987)).

597. 729 So. 2d 453 (Fla. 5th Dist. Ct. App. 1999).

598. *See Jetbroadband WV, LLC v. MasTec N. Am., Inc.*, 13 So. 3d 159, 162 n.3 (Fla. 3d Dist. Ct. App. 2009). The exact language of the forum selection clause is not set forth in the appellate court’s decision in *Hampton Island*, which may very well have been because the clause was contained in a copy of an unsigned agreement. *See Hampton Island Pres., LLC*, 998 So. 2d at 667. However, if the agreement had been signed, then the determination of what type of clause it was may have been crucial. *See id.* Was it a forum selection clause, a choice of law provision, or both, and did the provision include an agreement to submit to Florida’s jurisdiction?

599. *Rensin v. State*, 34 Fla. L. Weekly D402, D402 (1st Dist. Ct. App. Feb. 19, 2009).

600. *Id.* The corporations were also defendants, but this appeal only addressed Nonresident’s motion to dismiss. *See id.*

601. *Id.*

court agreed.<sup>602</sup> Nonresident appealed, and the First District Court of Appeal reversed.<sup>603</sup> Florida adopted the corporate shield doctrine in *Doe v. Thompson*,<sup>604</sup> which says that the “acts of [a] corporate employee performed in [his] corporate capacity do not form the basis for jurisdiction over [the] corporate employee in his individual capacity.”<sup>605</sup> At this point in its opinion, in a footnote, the First District Court of Appeal confirmed that this doctrine applies in the context of limited liability companies.<sup>606</sup> Further, the appellate court held that “it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer.”<sup>607</sup> An exception to the corporate shield doctrine exists in cases where the employee is accused of “fraud or other intentional misconduct” directed to Florida residents.<sup>608</sup> The First District Court of Appeal reversed because the State had not met its burden of proof as set forth in *Venetian Salami Co. v. Parthenais*.<sup>609</sup> Nonresident filed an affidavit to the effect “that he, personally, had no Florida contacts and was not a primary participant in any intentional tortious contacts expressly aimed at Florida.”<sup>610</sup> It was then up to the State to file counter-affidavits to establish personal jurisdiction, but the State failed to do so.<sup>611</sup> In addition, on Nonresident’s motion for clarification, the First District Court of Appeal said that the State could not now hold an evidentiary hearing in the trial court, since no affidavit was submitted by the State, and the appellate court clarified its earlier order to direct that the trial court dismiss the action as to Nonresident.<sup>612</sup>

#### D. Personal Jurisdiction: Tort Case

The next case is another long-arm statute case, but this one is a tort action.<sup>613</sup> Beta (Florida LLCs) hired Mintz & Fraade, P.C., a New York pro-

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602. See *id.*

603. *Rensin*, 34 Fla. L. Weekly at D402.

604. 620 So. 2d 1004 (Fla. 1993).

605. *Rensin*, 34 Fla. L. Weekly at D402 (quoting *Thompson*, 620 So. 2d at 1006) (alteration in original).

606. See *id.* at D403 n.1 (citing *Stomar, Inc. v. Lucky Seven Riverboat Co., LLC*, 821 So. 2d 1183, 1187 (Fla. 4th Dist. Ct. App. 2002)).

607. *Id.* at D402 (quoting *Estabrook v. Wetmore*, 529 A.2d 956, 959 (N.H. 1987)).

608. *Id.* (quoting *Thompson*, 620 So. 2d at 1006 n.1).

609. 554 So. 2d 499 (Fla. 1989); see *Rensin*, 34 Fla. L. Weekly at D403.

610. *Rensin*, 34 Fla. L. Weekly at D402.

611. See *id.* at D403.

612. See *id.*

613. See *Beta Drywall Acquisition, LLC v. Mintz & Fraade, P.C.*, 9 So. 3d 651 (Fla. 4th Dist. Ct. App. 2009).

fessional corporation (NY Firm), to handle legal work involving the acquisition of the assets of Beta Drywall, a Florida corporation.<sup>614</sup> The legal work was all done in New York, except for the closing.<sup>615</sup> Florida LLCs sued NY Firm for malpractice, alleging failure to prepare certain documents for the newly created Florida LLCs, which resulted in disputes among the members and a derivative action.<sup>616</sup> The trial court dismissed the suit for lack of personal jurisdiction over NY Firm.<sup>617</sup> On appeal, the Fourth District Court of Appeal discussed the two-part test under *Wendt v. Horowitz*,<sup>618</sup> as interpreted by the Fourth District Court of Appeal in *Renaissance Health Publishing, LLC v. Resveratrol Partners, LLC*.<sup>619</sup> With respect to the first prong of the test, which requires that the court find the commission of a tort in Florida, the court needs to consider the following rules in applying section 48.193(1)(b) of the *Florida Statutes*.<sup>620</sup> “[A] cause of action for tort accrues wherever plaintiff suffers damage to his property.”<sup>621</sup> The defendant does not have to be physically in Florida to commit a tort in Florida, nor does there have to be “a physical tort” committed in Florida to be within the reach of the long-arm statute.<sup>622</sup> “[A] foreign defendant can commit a tort within Florida via its electronic, telephonic, or written communications into” Florida provided the cause of action for tort results from those communications.<sup>623</sup> As alleged, the tort of malpractice involved the claimed faulty formation of and filing of faulty documents in Florida for the two Florida LLCs.<sup>624</sup> The entities could only have been formed by NY Firm sending communications into Florida, that is, the filing of the documents in Florida.<sup>625</sup> As to the second prong of the *Wendt* test, the appellate court found that NY Firm’s activities also satisfied the due process minimum contacts requirement, concluding that “[a] reasonable person having conducted the activities conducted

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614. *Id.* at 652.

615. *Id.* The opinion does not state where the closing was held or who attended.

616. *See id.*

617. *Beta*, 9 So. 3d at 652.

618. 822 So. 2d 1252 (Fla. 2002); *see Beta*, 9 So. 3d at 652.

619. 982 So. 2d 739, 741 (Fla. 4th Dist. Ct. App. 2008); *see Beta*, 9 So. 3d at 652; *see also* Landau, 2007–2008 Survey, *supra* note 120, at 117 (discussing the *Renaissance Health* decision).

620. *Beta*, 9 So. 3d at 653 (citing *Becker v. Hooshmand*, 841 So. 2d 561, 562–63 (Fla. 4th Dist. Ct. App. 2003)).

621. *Id.* (citing *Becker*, 841 So. 2d at 562).

622. *See id.*

623. *Id.*

624. *See id.* at 652.

625. *See Beta*, 9 So. 3d at 653.

by [NY Firm] would reasonably foresee being haled into court in Florida should an issue regarding the very formation of [Florida LLCs] arise.”<sup>626</sup>

#### E. *Forum Non Conveniens*

Lisa, S.A. (Plaintiff), a Panamanian corporation that owned shares in Avicola, a Guatemalan corporation, sued other shareholders of Avicola (Defendants) in connection with Plaintiff’s interests in the Guatemalan corporation.<sup>627</sup> The trial court dismissed the second amended complaint, concluding that Plaintiff had an “adequate alternative forum” in the Guatemalan courts.<sup>628</sup> With respect to Plaintiff’s allegations that defendant shareholders “stole” Plaintiff’s “one-third share of [Avicola’s] assets and profits” and converted them to Florida situs assets, the Third District Court of Appeal noted that there have been cases where jurisdiction has properly been retained over a defendant’s assets here for satisfaction of a final judgment that might be obtained in a foreign jurisdiction.<sup>629</sup> However, since Plaintiff was not able to adequately trace the conversion of Guatemalan assets to Florida assets, or demonstrate a connection between the Defendants’ Florida assets and the alleged wrongdoing of the Defendants, there was no justification for the trial court in Florida to retain even limited local jurisdiction over Defendants’ Florida assets.<sup>630</sup> However, that would not preclude future proceedings in Florida under the rules of comity to satisfy a Guatemalan judgment from Defendants’ Florida property.<sup>631</sup>

#### F. *Venue*

In *Koslow v. Sanders*,<sup>632</sup> Sanders sued Koslow for breach of contract, instituting the action in Collier County where Sanders resided.<sup>633</sup> Koslow’s motion to change venue to Broward County, where he resided, was denied by the court.<sup>634</sup> Sanders claimed “that venue was proper in Collier County where he resided because that is where any payments owed to him under the contract would be due.”<sup>635</sup> The Second District Court of Appeal reversed and

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626. *Id.* at 653.

627. *Lisa, S.A. v. Gutierrez*, 992 So. 2d 413, 413 (Fla. 3d Dist. Ct. App. 2008).

628. *Id.* at 414.

629. *Id.* at 413–14.

630. *See id.* at 415.

631. *Id.*

632. 4 So. 3d 37 (Fla. 2d Dist. Ct. App. 2009).

633. *Id.* at 38.

634. *Id.*

635. *Id.*

ordered the transfer of the action to Broward County.<sup>636</sup> The Second District acknowledged that venue is proper in the county where the creditor resides when the contract does not state the place where payment is to be made, but only if the amount of the payment is specified in the context of a “debtor-creditor relationship” and the lawsuit is over an amount specified in the contract.<sup>637</sup> Sanders and Koslow were not in a debtor-creditor relationship.<sup>638</sup> This was an accounting and declaratory judgment action arising out of an alleged breach of contract, and the amount Koslow owed Sanders, if any, had yet to be determined.<sup>639</sup> Therefore, the general breach of contract venue rule applicable to performance contracts applied, that is, the place where the defaulting party fails to perform.<sup>640</sup> Koslow’s breach of the contract, if it occurred, would have been failure to perform administrative duties, and that would have taken place in Broward County, where Koslow resided.<sup>641</sup>

### G. *Standing*

In *Save the Homosassa River Alliance, Inc. v. Citrus County, Florida*,<sup>642</sup> the Citrus County Board of County Commissioners passed an ordinance that amended its land development code allowing the Homosassa River Resort, LLC to develop property it owned along the Homosassa River.<sup>643</sup> The County was sued by Save the Homosassa River Alliance, Inc. (the Alliance), Mr. Bitter, Ms. Rendueles and Ms. Watkins (collectively referred to as Plaintiffs), who claimed that the ordinance violated the land development code.<sup>644</sup> The “Alliance is a not-for-profit corporation ‘committed to the preservation and conservation of environmentally sensitive lands and the wildlife in and around the Homosassa River and in Old Homosassa, Florida.’”<sup>645</sup> All of the individual plaintiffs lived on property they owned in Citrus County, but none owned property that was adjacent to the development site.<sup>646</sup> And all of the

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636. *Id.* at 39.

637. *Koslow*, 4 So. 3d at 38 (citing *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So. 2d 487, 487–89 (Fla. 2d Dist. Ct. App. 1970)).

638. *See id.*

639. *Id.*

640. *Id.* at 38–39 (quoting *Speedling, Inc. v. Krig*, 378 So. 2d 57, 58 (Fla. 2d Dist. Ct. App. 1979)).

641. *Id.* at 39.

642. 2 So. 3d 329 (Fla. 5th Dist. Ct. App. 2008), *reh’g denied*, 16 So. 3d 132 (Fla. 2009) (unpublished table decision).

643. *Id.* at 331.

644. *Id.*

645. *Id.*

646. *See id.* at 331, 339.

individual plaintiffs expressed a general concern with and an interest in preserving the environment so that they could continue to enjoy it in various ways—for example, boating, fishing, bicycling, and walking.<sup>647</sup> Plaintiffs also cited increased demands on public services, such as water and roadways, which would result from a larger population attracted by the development.<sup>648</sup> The trial court found that Plaintiffs' assertions about the development were not sufficient allegations that they were adversely affected "in a way not experienced by the general population."<sup>649</sup> Plaintiffs' second amended complaint was dismissed with prejudice by the trial court on the ground that Plaintiffs lacked standing to sue.<sup>650</sup> The Fifth District Court of Appeal reversed and remanded.<sup>651</sup> The appellate court began its analysis on standing by stating the common law rule applicable before 1985, "that, in order to have standing to challenge a land use decision, a party had to possess a legally recognized right that would be adversely affected by the decision or suffer special damages different in kind from that suffered by the community as a whole."<sup>652</sup> In 1985, the legislature passed section 163.3215 of the *Florida Statutes*, and according to the Fifth District Court of Appeal, "[t]here is no doubt that the purpose of the adoption of section 163.3215 was to liberalize standing in [the] context" of challenging land use decisions.<sup>653</sup> The new and more liberal standing rule only requires that the person complaining "must allege that they have an interest that is something more than a 'general interest in community well being.'"<sup>654</sup> The Fifth District Court of Appeal stated that "the case law assumes that an organization has an interest that is greater than 'the general interest in community well being' when the organization's primary purpose includes protecting the particular interest that they allege will be adversely affected by the comprehensive plan violation."<sup>655</sup> Plaintiffs' allegations satisfied the new, more liberal standing requirements.<sup>656</sup> Judge Pleus dissented, saying that the majority's opinion regarding standing

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647. *Save the Homosassa River Alliance, Inc.*, 2 So. 3d at 332–33.

648. *Id.* at 334.

649. *Id.* at 332.

650. *Id.*

651. *Id.* at 340. The appellate court also held that "Plaintiffs had not abused the privilege to amend," and it, therefore, was error for the trial court to have dismissed Plaintiffs' second amended complaint with prejudice. *Save the Homosassa River Alliance, Inc.*, 2 So. 3d at 340 n.11.

652. *Id.* at 336.

653. *Id.*

654. *Id.* at 337.

655. *Id.*

656. *Save the Homosassa River Alliance, Inc.*, 2 So. 3d at 340.



is squarely opposed to the weight of authority.<sup>657</sup> Judge Pleus found it especially troubling that the individual plaintiffs' Citrus County property was not adjacent to the development site.<sup>658</sup> Judge Pleus observed that "[e]very gadfly with some amorphous environmental agenda, and enough money to pay a filing fee, will be anointed with status simply because the gadfly wants to 'protect the planet.'"<sup>659</sup> and he concluded his dissent by saying, "[f]or those who respect property rights, look out!"<sup>660</sup>

#### H. *Domestication of Out-of-Country Foreign Money Judgment*

In *Israel v. Flick Mortgage Investors*,<sup>661</sup> Purchasers, who were Israeli citizens, bought homes at a Florida golf resort, and Flick held mortgages on the properties.<sup>662</sup> As it turned out, Purchasers paid substantially more for the properties than the properties were worth, and they sued Flick and others, in Israel, to "unwind" the sales.<sup>663</sup> Purchasers, as plaintiffs in the Israeli action, served Flick in Florida with their complaint and did so using registered mail.<sup>664</sup> Flick moved to dismiss the suit in Israel on the grounds of lack of personal jurisdiction over him, and he filed a supporting affidavit.<sup>665</sup> Flick's attorney appeared in connection with the motion, but the Israeli court struck the affidavit because Flick failed to appear.<sup>666</sup> Ultimately, the motion to dismiss was denied.<sup>667</sup> Flick did not challenge the sufficiency of service of process, and he did not subsequently participate in the action in Israel.<sup>668</sup> After Purchasers obtained a judgment against Flick for almost \$1,500,000, Purchasers sought to domesticate the Israeli money judgment in Florida under Florida's Uniform Out-of-Country Foreign Money-Judgment Act (the Act), sections 55.601–.607 of the *Florida Statutes*.<sup>669</sup> Flick successfully moved for summary judgment in the Florida trial court on the ground of "insufficiency of service of process in the Israeli action."<sup>670</sup> Purchasers ap-

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657. *Id.* at 340–41 (Pleus, J., dissenting).

658. *See id.*

659. *Id.* at 346.

660. *Id.*

661. 33 Fla. L. Weekly D2732 (3d Dist. Ct. App. Nov. 26, 2008).

662. *Id.* at D2732.

663. *Id.*

664. *Id.*

665. *Id.*

666. *Israel*, 33 Fla. L. Weekly at D2732.

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

pealed, and the Third District Court of Appeal reversed and remanded.<sup>671</sup> In the Florida trial court, Flick failed to raise any defense to domestication that was authorized by the Act.<sup>672</sup> The manner of how service of process is effected is not “one of the ten grounds for nonrecognition or nonenforceability that may be asserted under the Act.”<sup>673</sup> Further, Flick waived the defense of insufficient service of process by not raising it in the Israeli court when he challenged personal jurisdiction there.<sup>674</sup>

## XII. LANDLORD AND TENANT RELATIONSHIP

### A. Execution Requirements

In *Skylake Insurance Agency, Inc. v. NMB Plaza, LLC*,<sup>675</sup> NMB Plaza (Landlord LLC) was constructing an office building when it entered into a lease agreement with Skylake Insurance Agency, Inc. (Tenant).<sup>676</sup> The lease was signed by a member of Landlord LLC and by the president and a vice-president of Tenant, on behalf of their respective entities.<sup>677</sup> The lease term was for ten years to begin about three months after the building was completed.<sup>678</sup> None of these signatures were witnessed.<sup>679</sup> Prior to completion of the building, Landlord LLC claimed that the lease was unenforceable against it under the Florida Statute of Frauds, section 689.01 of the *Florida Statutes*, because of the absence of witnesses.<sup>680</sup> Tenant sued Landlord LLC for specific performance.<sup>681</sup> The trial court granted summary judgment to Landlord LLC.<sup>682</sup> Tenant appealed and the Third District Court of Appeal reversed, identifying and relying on sections 608.425(3) and 608.4235(3) of the *Flori-*

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671. *Israel*, 33 Fla. L. Weekly at D2732.

672. *Id.*

673. *Id.*

674. *Id.*

675. 33 Fla. L. Weekly D2215 (3d Dist. Ct. App. Sept. 17, 2008), *rev'd*, No. 3D07-454, 2009 WL 3446494 (Fla. 3d Dist. Ct. App. Oct. 28, 2009).

676. *Id.* at D2215.

677. *Id.*

678. *Id.*

679. *Id.*

680. *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215. Tenant relied on the corporate exception at the end of section 689.01 of the *Florida Statutes*. *Id.* The appellate court held that the corporate exception does not apply to a limited liability company. *Id.*

681. *Id.* Tenant also sought damages for fraud, and the trial court granted summary judgment in favor of Landlord LLC on this claim as well. *Id.*

682. *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215.

*da Statutes*.<sup>683</sup> Section 608.425(3) validates the “disposition” of property by a limited liability company if the documents are executed as provided in chapter 608 of the *Florida Statutes*.<sup>684</sup> Notably, the Third District held that a lease is a “disposition of property.”<sup>685</sup> The appellate court concluded that since section 608.4235(3) grants limited liability company members, or managers as the case may be, the authority to deal with the limited liability company’s real estate by merely signing and delivering the appropriate instruments, no witnesses were required.<sup>686</sup>

#### B. *Landlord’s Right to Writ of Possession*

*Kosoy Kendall Associates, LLC v. Los Latinos Restaurant, Inc.*<sup>687</sup> is a short opinion that illustrates the draconian remedies available to a landlord whose tenant is in default.<sup>688</sup> The trial court held an adversarial hearing on the default and refused to issue the landlord a writ of possession.<sup>689</sup> The Third District Court of Appeal said that the adversarial hearing was unauthorized, and “[u]pon the lessee’s failure to timely deposit a monthly rental payment into the registry as required by court order under section 83.232, *Florida Statute[s]*, the petitioner-landlord was absolutely entitled to an ex parte, immediate default for a writ of possession of the premises.”<sup>690</sup> Tenant’s payment, due February 1, 2009 and tendered February 5, 2009, was too late.<sup>691</sup> Landlord’s application for mandamus was granted.<sup>692</sup>

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683. *Id.* In the absence of a provision to the contrary in an LLC’s articles of organization or in its operating agreement, a member can sign on behalf of a member-managed company, and a manager is authorized to sign on behalf of a manager-managed LLC. *See* FLA. STAT. § 608.4235(3) (2009). There was no discussion in the opinion as to whether Landlord LLC was member-managed or manager-managed or as to what the company’s organization documents may have provided, but the appellate court noted that the Landlord had admitted that it signed the lease, and Landlord “raise[d] no claim that the . . . signature was unauthorized.” *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215.

684. FLA. STAT. § 608.425(3).

685. *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215.

686. *See id.*

687. 10 So. 3d 1168 (Fla. 3d Dist. Ct. App. 2009).

688. *See id.* at 1168.

689. *Id.*

690. *Id.* (footnote omitted).

691. *Id.* at 1168 n.1.

692. *Kosoy Kendall Assocs., LLC*, 10 So. 3d at 1169.

## XIII. PRINCIPAL AND AGENT

In *Jaylene, Inc. v. Moots*,<sup>693</sup> Ms. Crisson (Principal) had given her power of attorney to Ms. Moots (Agent).<sup>694</sup> Agent's authority included entering "into binding contracts on [Principal's] behalf," and taking "any and all legal steps necessary to collect any . . . debt owed to [Principal], or to settle any claim."<sup>695</sup> The general power of attorney also granted to the agent "full power and authority to act" on behalf of the principal.<sup>696</sup> The general power of attorney went on to say that "[t]he listing of specific powers is not intended to limit or restrict the general powers granted in this Power of Attorney in any manner."<sup>697</sup> Acting under this power, Agent arranged for Principal to live in a nursing home.<sup>698</sup> The agreement with the nursing home, signed by Agent, contained an optional arbitration clause.<sup>699</sup> The arbitration clause could be eliminated by marking an "X" through it.<sup>700</sup> This was not done by Agent.<sup>701</sup> The arbitration clause provided that the Florida Arbitration Code would apply to any claim or controversy arising from the agreement.<sup>702</sup> After Principal died, Agent, as personal representative of Principal's estate, brought a nursing home resident's rights lawsuit against the nursing home and others.<sup>703</sup> The nursing home's motion to compel arbitration under the terms of the agreement was denied by the circuit court.<sup>704</sup> The Second District Court of Appeal reversed.<sup>705</sup> The appellate court acknowledged that the general power of attorney did not give the agent specific authority to consent to arbitration.<sup>706</sup> Nevertheless, the appellate court found that the power of attorney was "extremely broad and unambiguous," and Agent's authority was virtually all-inclusive.<sup>707</sup> The Second District went on to say that, "[w]e are not prepared to state that a grant of the authority to settle claims includes the authority to consent to arbitration."<sup>708</sup> The Second District Court of Ap-

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693. 995 So. 2d 566 (Fla. 2d Dist. Ct. App. 2008).

694. *Id.* at 567.

695. *Id.* at 568.

696. *Id.*

697. *Id.*

698. *See Jaylene, Inc.*, 995 So. 2d at 567.

699. *Id.* at 567–68.

700. *Id.* at 568.

701. *Id.*

702. *Id.*

703. *Jaylene, Inc.*, 995 So. 2d at 567.

704. *Id.*

705. *Id.*

706. *Id.* at 568.

707. *Id.*

708. *Jaylene Inc.*, 995 So. 2d at 569.

peal found, however, that “the specific grant of authority to settle claims in the document under review in this case is consistent with the view that the [power of attorney’s] broad grant of authority includes the power to consent to arbitration.”<sup>709</sup> Agent relied on *In re Estate of McKibbin v. Alterra Health Care Corp.*<sup>710</sup> The *In re Estate of McKibbin* court—also the Second District—held in that case that the power of attorney there did not contain anything that authorized the agent to enter into, on behalf of his principal, an agreement to arbitrate.<sup>711</sup> The Second District Court of Appeal concluded that *In re Estate of McKibbin* was not controlling.<sup>712</sup> The *In re Estate of McKibbin* opinion did “not set forth the language of the power of attorney” considered by the court to be deficient.<sup>713</sup>

About five weeks after the Second District Court of Appeal rendered its opinion in *Jaylene, Inc.*, the court decided *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*.<sup>714</sup> Ms. Huerta’s daughter-in-law (Agent), under the power of attorney given to her by Ms. Huerta, arranged for Ms. Huerta’s admission to a nursing home owned by Sovereign Healthcare of Tampa, LLC (Sovereign).<sup>715</sup> The general power did not grant Agent specific authority to agree on Ms. Huerta’s behalf to arbitration.<sup>716</sup> Ms. Huerta died, and Agent, as personal representative, sued Sovereign.<sup>717</sup> Sovereign moved to compel Agent to arbitrate these issues, but the trial court denied the motion, relying on *In re Estate of McKibbin*.<sup>718</sup> The Second District Court reversed, stating that the trial court incorrectly relied on *In re Estate of McKibbin* in denying Sovereign’s motion.<sup>719</sup> Noting that it had addressed the limitations of the *In re Estate of McKibbin* decision in *Jaylene, Inc.*, the Second District Court of Appeal found in this case that the general catch-all provision’s grant of authority contained in the power of attorney was sufficiently broad and unambiguous enough to permit the agent’s consent to arbitration on behalf of the principal.<sup>720</sup> This provision, when considered with several other provisions of the power of attorney that granted the right to sign consents and re-

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709. *Id.*

710. *Id.* (relying on 977 So. 2d 612 (Fla. 2d Dist. Ct. App. 2008 (per curiam))).

711. *In re Estate of McKibbin*, 977 So. 2d at 613.

712. *Jaylene, Inc.*, 995 So. 2d at 570.

713. *Id.* (citing *Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st Dist. Ct. App. 2005)).

714. 14 So. 3d 1033 (Fla. 2d Dist. Ct. App. 2009).

715. *Id.* at 1034.

716. *Id.*

717. *Id.* The complaint alleged negligence, wrongful death, and breach of fiduciary duty.

718. *Sovereign Healthcare of Tampa, LLC*, 14 So. 3d at 1034.

719. *Id.*

720. *Id.* at 1035.

leases, was sufficient to find that the agent had the authority to consent to arbitration.<sup>721</sup> The court relied on its March 2009 decision in *Carrington Place of St. Pete, LLC v. Estate of Milo*,<sup>722</sup> and held that, “[w]hether a [power of attorney] contains a provision that constitutes a sufficiently broad and unambiguous grant of general authority . . . requires examination of the language of any catch-all provision contained in [the power of attorney], as well as of the relationship of that language to the type” of authority specifically granted.<sup>723</sup>

#### XIV. TAXES

##### A. Documentary Stamp Tax

*Department of Revenue v. Pinellas VP, LLC*<sup>724</sup> involved two distinct sets of transfers.<sup>725</sup> With respect to the first transaction, Mr. Pridgen was the sole member of Pinellas VP, LLC (Pinellas) and the sole shareholder and director of Tarpon Ridge, Inc.<sup>726</sup> Pinellas received twenty acres of land from Tarpon Ridge, Inc. by warranty deed.<sup>727</sup> Thus, Mr. Pridgen’s solely owned corporation transferred real estate to his solely owned LLC.<sup>728</sup> Although Pinellas paid no money for the conveyance, it took the land subject to a mortgage.<sup>729</sup> Pinellas “paid a \$19,250 documentary stamp tax based on the outstanding [mortgage] balance.”<sup>730</sup> The second transaction involved the transfer of real estate from an LLC to its members.<sup>731</sup> Tarpon Ridge, Inc. was the managing and sole member of TPA Investments, LLC (TPA).<sup>732</sup> TPA and Lindell-Gandy LLC,<sup>733</sup> in turn, were the members of Imperial, LLC<sup>734</sup> Imperial, LLC transferred real estate by warranty deed to its members, TPA and Lindell-

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721. *Id.*

722. 34 Fla. L. Weekly D640 (2d Dist. Ct. App. Mar. 25, 2009).

723. *Sovereign Healthcare of Tampa, LLC*, 14 So. 3d at 1034.

724. 3 So. 3d 361 (Fla. 2d Dist. Ct. App. 2009); *see also* Dep’t of Revenue v. Pilgrim Hall, LLC, 34 Fla. L. Weekly D456 (2d Dist. Ct. App. Feb. 27, 2009) (per curiam).

725. *Pinellas VP, LLC*, 3 So. 3d at 362.

726. *Id.*

727. *Id.*

728. *See id.*

729. *Id.*

730. *Pinellas VP, LLC*, 3 So. 3d at 362.

731. *Id.*

732. *Id.*

733. *Id.* The opinion does not disclose who the members of Lindell-Gandy LLC are, but it does say that Mr. Pridgen was not a member. *See id.*

734. *Pinellas VP, LLC*, 3 So. 3d at 362.

Gandy, as tenants in common.<sup>735</sup> TPA and Lindell-Gandy paid no money for the real estate, but took it subject to a mortgage.<sup>736</sup> Imperial, LLC had given a promissory note securing the mortgage, and Mr. Pridgen guaranteed one-half of Imperial's note.<sup>737</sup> TPA recorded the deed and paid a documentary stamp tax of \$161,546.70 based on the principal amount of the mortgage.<sup>738</sup> Pinellas and TPA then sued for refunds of the documentary stamp tax paid.<sup>739</sup> The trial court granted their motions for summary judgment.<sup>740</sup> The Second District Court of Appeal reversed, distinguishing the facts of *Crescent Miami Center, LLC v. Florida Department of Revenue*<sup>741</sup> from the two situations before it.<sup>742</sup> In *Crescent Miami Center*, no money changed hands upon a direct real estate transfer from a parent corporation and its wholly-owned subsidiary.<sup>743</sup> In addition, there was no mortgage involved.<sup>744</sup> The Supreme Court of Florida in *Crescent Miami Center* held that there was no taxable event, no change of beneficial ownership, only a change in the form of ownership.<sup>745</sup> In this case, there was consideration in the form of mortgages encumbering the transferred property.<sup>746</sup> Section 201.02(1) of the *Florida Statutes* specifically refers to mortgages as consideration upon which calculation of the seventy cents per one hundred dollars of consideration is applied.<sup>747</sup> The fact that Mr. Pridgen would bear the economic burden of the mortgages was irrelevant.<sup>748</sup> There was a transfer between different legal entities for consideration.<sup>749</sup>

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735. *Id.*

736. *Id.*

737. *Id.*

738. *Id.*

739. *Pinellas VP, LLC*, 3 So. 3d at 362.

740. *Id.* at 362–63.

741. 903 So. 2d 913 (Fla. 2005).

742. *Pinellas VP, LLC*, 3 So. 3d at 364; *see also* Dep't of Revenue v. Pilgrim Hall, LLC, 34 Fla. L. Weekly D456, D456 (2d Dist. Ct. App. Feb. 27, 2009) (per curiam) (a case heard with the *Pinellas* and *TPA Investment* cases).

743. *Pinellas VP, LLC*, 3 So. 3d at 364 (citing *Crescent Miami Ctr., LLC*, 903 So. 3d at 914).

744. *Id.* (citing *Crescent Miami Ctr., LLC*, 903 So. 3d at 914).

745. *Crescent Miami Ctr., LLC*, 903 So. 3d at 918–19.

746. *Pinellas VP, LLC*, 3 So. 3d at 364.

747. FLA. STAT. § 201.02(1) (2009); *see also* S.B. 2430, 2009 Leg., (Fla. 2009) (signed by Gov. Crist on June 10, 2009, amending section 201.02(1) of the *Florida Statutes*, for statutory limitations on the Supreme Court of Florida's decision in *Miami Crescent Ctr., LLC*).

748. *See Pinellas VP, LLC*, 3 So. 3d at 364.

749. *See id.* at 361.

## B. Florida Tax on Real Estate Rental Payments

Section 212.031(1)(c) of the *Florida Statutes* imposes a six percent privilege tax on total rent charged for leasing real estate.<sup>750</sup> Under this section, total rent specifically includes “base rent.”<sup>751</sup> The section goes on to say that where there are required contractual payments taxable as total rent and those that are not, reasonable allocation must be made between taxable and non-taxable payments.<sup>752</sup> In *USCardio Vascular, Inc. v. Florida Department of Revenue*,<sup>753</sup> USCardio Vascular (Landlord) made a lease agreement with a physician group (Tenant).<sup>754</sup> The lease agreement called for the payment of “base rent.”<sup>755</sup> The agreement also referred to center expenses and the rental fee.<sup>756</sup> The latter two items were synonymous with base rent.<sup>757</sup> Included in the definition of center expenses, and thus a part of base rent, were items “such as salaries, benefits and insurance for the employees leased by the [Landlord] to the [Tenant].”<sup>758</sup> Standing alone, the payments of these expenses are not subject to the six percent tax.<sup>759</sup> Landlord paid the excise tax on the amount of lease payments it deemed subject to the tax but not on the entire base rent.<sup>760</sup> The Florida Department of Revenue assessed a deficiency calculated on the entire base rent.<sup>761</sup> Its motion for summary judgment was granted by the trial court.<sup>762</sup> Landlord appealed, and the First District Court of Appeal reversed.<sup>763</sup> The First District Court of Appeal held that, regardless of how the payments were characterized, that is, as base rent, some of the center expenses are not subject to the six percent tax.<sup>764</sup> The case was remanded for the trial court’s determination of taxable and non-taxable payments under the lease agreement.<sup>765</sup> Judge Benton dissented.<sup>766</sup> He would have held that the Landlord was bound by its use of “base rent” in the

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750. FLA. STAT. § 212.031(1)(c) (2009).

751. *Id.*

752. *Id.*

753. 993 So. 2d 81 (Fla. 1st Dist. Ct. App. 2008), *reh’g denied*, 8 So. 3d 1133 (Fla. 2009).

754. *Id.* at 82.

755. *Id.*

756. *Id.* at 82–83.

757. *Id.* at 82–84.

758. *USCardio Vascular, Inc.*, 993 So. 2d at 84–85 (footnote omitted).

759. *Id.* at 85.

760. *See id.* at 84.

761. *Id.*

762. *Id.*

763. *USCardio Vascular, Inc.*, 993 So. 2d at 82.

764. *Id.* at 85.

765. *Id.*

766. *Id.* at 85 (Benton, J., dissenting).



agreement,<sup>767</sup> which was described by the majority as “undoubtedly a poor choice of words.”<sup>768</sup>

## XV. TORTS

### A. *Negligence: Limitation of Liability of Professional*

*Witt v. La Gorce Country Club, Inc.*<sup>769</sup> involved a professional’s—a licensed geologist’s—attempt, by contractual provision, to limit his malpractice liability.<sup>770</sup> Mr. Witt (Geologist) was employed by Gerhardt M. Witt and Associates, Inc. (Geologist’s Corporation).<sup>771</sup> Geologist’s Corporation was hired by La Gorce Country Club (Club) to consult on the design and installment of a “reverse osmosis water treatment” project.<sup>772</sup> The contract between Club and Geologist’s Corporation contained a limit of liability provision.<sup>773</sup> Despite numerous problems with the system, the project was eventually completed, but after fourteen months of continued deterioration, “the system failed completely.”<sup>774</sup> Club sued Geologist and Geologist’s Corporation for, among other things, professional malpractice.<sup>775</sup> The trial judge ruled that the contractual liability limitation was enforceable with respect to Geologist’s Corporation, but not with respect to Geologist personally, as a professional.<sup>776</sup> The Third District Court of Appeal affirmed.<sup>777</sup> The limitation of liability as to Geologist was unenforceable as a matter of law under section 492.111(4) of the *Florida Statutes*—professional geologist’s personal liability.<sup>778</sup> As a matter of public policy, “[a] cause of action in negligence against an individual professional exists irrespective, and essentially, independent of a professional services agreement.”<sup>779</sup>

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767. *Id.*

768. *USCardio Vascular, Inc.*, 993 So. 2d at 85 (majority opinion).

769. 34 Fla. L. Weekly D1161 (Fla. 3d Dist. Ct. App. June 10, 2009).

770. *Id.* at D1161. The court also had before it issues involving arbitrability, “fraud in the inducement and violation of the Florida Deceptive and Unfair Trade Practices Act.” *Id.*

771. *Id.*

772. *Id.*

773. *Witt*, 34 Fla. L. Weekly at D1161.

774. *Id.* at D1161–62.

775. *Id.* at D1162.

776. *Id.*

777. *Id.* at D1163.

778. *Witt*, 34 Fla. L. Weekly at D1162 (citing FLA. STAT. § 492.111 (2009)); see *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999).

779. *Witt*, 34 Fla. L. Weekly at D1163.

### B. *Tortious Interference with Business or Contractual Relationship*

The Palm Beach County Health Care District (District) was created by Florida statute.<sup>780</sup> Its purpose was “to maximize the health and well-being of Palm Beach County residents by providing comprehensive planning, funding, and coordination of health care service delivery.”<sup>781</sup> It could “sue and be sued” and was also vested “with all sovereign immunity and limitations provided by the State Constitution or general law.”<sup>782</sup> The District employed Dr. Davis (Director) as its Trauma Agency director.<sup>783</sup> Professional Medical Education, Inc. (PME) provided training to Palm Beach County emergency medical services employees.<sup>784</sup> The District would pay for the training upon completion of the program.<sup>785</sup> Basic Trauma Life Support of Florida, Inc. (BTLS) was an organization that certified the providers of medical personnel training.<sup>786</sup> Director wrote to BTLS after there had been some disagreement between Director and the owner of PME regarding “necessary documentation for reimbursement.”<sup>787</sup> After the letter was sent, the contents of which are not disclosed in the opinion, BTLS suspended PME’s certification.<sup>788</sup> In the meantime, PME had contracted to provide instruction to Palm Beach County Fire Rescue personnel, but the training was placed on “hold” when told by Director that the District would not be paying for the training.<sup>789</sup> PME sued the District and Director for defamation and the District for tortious interference and conspiracy.<sup>790</sup> The trial court directed a verdict for Director on the defamation count ruling that, under *McNayr v. Kelly*,<sup>791</sup> Director had absolute immunity as an “executive official of government” who “was acting within the scope of his employment.”<sup>792</sup> However, the trial court let the jury’s verdict of over \$690,000 against the District on all counts

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780. *Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090, 1092 (Fla. 4th Dist. Ct. App. 2009).

781. *Id.* (quoting *Palm Beach County Health Care Act*, ch. 2003-326, § 3(2), 2003 Fla. Laws 101, 102).

782. *Id.* (quoting *Palm Beach County Health Care Act* §6(6)).

783. *Id.* at 1093.

784. *Id.*

785. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1093.

786. *Id.*

787. *Id.*

788. *Id.*

789. *Id.*

790. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1093.

791. 184 So. 2d 428 (Fla. 1966).

792. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1093, 1095 (quoting *McNayr*, 184 So. 2d at 433).

stand.<sup>793</sup> The Fourth District Court of Appeal reversed the trial court's order against the District.<sup>794</sup> In order to sustain a tortious interference claim, the defendant must be a "stranger to the business relationship"<sup>795</sup> at issue and can have no "beneficial or economic interest in, or control over, that [business] relationship."<sup>796</sup> The District was an interested third party.<sup>797</sup> It was paying the bills, including those submitted by PME.<sup>798</sup> Furthermore, the defamation count against the District was grounded on the action of Director, the District's employee.<sup>799</sup> The appellate court concluded that the trial court's directed verdict in favor of Director was proper and therefore, Director's immunity from the defamation claim had to exonerate the District.<sup>800</sup> As no wrongful acts were committed by the District and Director against PME, there was no basis for a civil conspiracy action.<sup>801</sup>

### C. *Investment Advice: Fraudulent Inducement*

When Plaintiffs sold their company to Winstar Communications, Inc. (Winstar) in 1998, they were paid eighty percent of the purchase price in Winstar stock.<sup>802</sup> They also were named as vice presidents of Winstar.<sup>803</sup> Winstar entered into an "investment banking relationship" with Salomon Smith Barney, Inc. (SSB) in 1999, and some "transactions generated substantial fees for SSB."<sup>804</sup> The appellate court noted that the relationship between Winstar and SSB "created incentives for SSB" to encourage potential and current owners of Winstar stock, respectively, to buy and to hold Winstar stock.<sup>805</sup> The evidence showed that the Winstar stock investment quality was overstated by SSB analysts "through a series of communications with the general public and with Winstar employees."<sup>806</sup> In addition, starting in Janu-

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793. See *id.* at 1093.

794. *Id.* at 1096.

795. *Id.* at 1094 (quoting *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 386 (Fla. 4th Dist. Ct. App. 1999)).

796. *Id.* (quoting *Nimbus Techs., Inc. v. SunnData Prods., Inc.*, 484 F.3d 1305, 1309 (11th Cir. 2007)).

797. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1094.

798. *Id.*

799. *Id.* at 1095.

800. *Id.*

801. *Id.* at 1096.

802. *Goldin v. Salomon Smith Barney, Inc.*, 994 So. 2d 517, 518–19 (Fla. 3d Dist. Ct. App. 2008).

803. *Id.* at 519.

804. *Id.*

805. *Id.*

806. *Id.*

ary 2000, there were conference calls on a quarterly basis with an SSB analyst “who consistently reiterated the positive outlook [about] Winstar stock,” and Plaintiffs were on the phone during these calls.<sup>807</sup> However, beginning early in 2001, the analysts “were privately rating [the] stock at more negative levels.”<sup>808</sup> In April 2001, Winstar filed for bankruptcy protection and the value of Winstar stock owned by Plaintiffs collapsed.<sup>809</sup> Plaintiffs sued SSB alleging that SSB had fraudulently induced them to buy and hold Winstar stock.<sup>810</sup> Plaintiffs alleged that they “justifiably relied on affirmative misrepresentations” of SSB and its analysts in these quarterly calls, quarterly reports, and the news, in their decision to purchase and retain Winstar stock.<sup>811</sup> The parties agreed that New York law applied.<sup>812</sup> The trial court dismissed Plaintiffs’ second amended complaint with prejudice “for failure to allege a sufficiently direct communication” to them by SSB, and for their “failure to demonstrate that SSB had a duty to disclose any material information it may have withheld.”<sup>813</sup> Plaintiffs appealed, and the Third District Court of Appeal acknowledged that New York recognizes a claim of fraudulent inducement “to retain securities in reliance on a defendant’s affirmative misrepresentations.”<sup>814</sup> However, a plaintiff must allege facts that would prove justifiable reliance, which here would have required that they allege delivery of the misrepresentation from SSB to them, that they were induced by the misrepresentation to retain their stock, and that their reliance on alleged misrepresentation and their decision to hold the stock were both reasonable.<sup>815</sup> Plaintiffs failed to allege, nor could they “in good faith” have alleged, that they ever asked the SSB representative any questions during the conference calls, or that the SSB analyst even knew that Plaintiffs were on the line.<sup>816</sup> Under New York law, the alleged affirmative misrepresentation must be directly communicated to a plaintiff.<sup>817</sup> Plaintiffs here were in the same posi-

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807. *Goldin*, 994 So. 2d at 519. Plaintiffs alleged that they “participated” in the calls, but the court noted that they could not “in good faith” allege that SSB or the analyst was aware of the presence of Plaintiffs or of Plaintiffs’ participation, or that Plaintiffs had asked any questions during the calls. *Id.* at 520.

808. *Id.* at 519.

809. *Id.*

810. *Id.*

811. *Goldin*, 994 So. 2d at 520.

812. *Id.* at 519.

813. *Id.*

814. *Id.*

815. *Id.* at 519–20.

816. *Goldin*, 994 So. 2d at 520.

817. *Id.*

tion as any other stockholder.<sup>818</sup> New York law does not recognize reliance on publicly disseminated forecasts as justifiable.<sup>819</sup>

#### D. *Pre-injury Liability Release on Behalf of Minor Child*

Several cases decided in the past year and a half have addressed the issue of whether a parent's execution of a release absolving a commercial activity from liability to a minor for injury—prior to the injury—is binding on the minor child or the child's estate.<sup>820</sup> Before discussing the Supreme Court of Florida's answer to this important question in *Kirton v. Fields (Fields II)*,<sup>821</sup> a little procedural history will help set the stage.<sup>822</sup> In *Fields v. Kirton (Fields I)*,<sup>823</sup> the Fourth District Court of Appeal held that such a waiver was ineffective.<sup>824</sup> In reaching its conclusion, the Fourth District Court of Appeal certified an implicit conflict with a Fifth District Court of Appeal case, *Lantz v. Iron Horse Saloon, Inc.*,<sup>825</sup> where such a waiver was found effective.<sup>826</sup> In *Fields I*, the Fourth District Court of Appeal also certified the case as one of great public importance.<sup>827</sup> However, subsequent to the Fourth District Court's decision in *Fields I*, and its certification of conflict with *Lantz*, the Fifth District Court of Appeal decided *Applegate v. Cable Water Ski, L.C. (Applegate I)*,<sup>828</sup> where it agreed with the Fourth District in *Fields I*.<sup>829</sup> The Fifth District Court of Appeal in *Applegate I*, however, did not recede from *Lantz*.<sup>830</sup> Instead it distinguished *Lantz*, finding that the issue there was whether the trial court had correctly determined that the exculpatory provision involved was unambiguous.<sup>831</sup> In addition, the Fifth District Court of

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818. *Id.*

819. *See id.*

820. *See Kirton v. Fields (Fields II)*, 997 So. 2d 349, 350 (Fla. 2008); *Applegate v. Cable Water Ski, L.C. (Applegate I)*, 974 So. 2d 1112, 1113 (Fla. 5th Dist. Ct. App. 2008); *see also* Landau, 2007–2008 Survey, *supra* note 120, at 95 (discussing *Applegate I*).

821. 997 So. 2d 349 (Fla. 2008).

822. *Id.* at 351–52.

823. 961 So. 2d 1127 (Fla. 4th Dist. Ct. App. 2007), *reh'g granted*, 973 So. 2d 1121 (Fla. 2007).

824. *Id.* at 1130.

825. 717 So. 2d 590 (Fla. 5th Dist. Ct. App. 1998), *overruled by*, 997 So. 2d 349 (Fla. 2008).

826. *Fields I*, 961 So. 2d at 1130.

827. *Id.*

828. 974 So. 2d 1112 (Fla. 5th Dist. Ct. App. 2008).

829. *See id.* at 1113 & n.1.

830. *Id.* at 1116.

831. *Id.* It is not disclosed in *Lantz* whether the issue of the effectiveness of such a release was ever raised by the parties, and it apparently was not raised on appeal. *See Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590, 591–92 (Fla. 5th Dist. Ct. App. 1998), *overruled by*, 997

Appeal in *Applegate I* certified the question to the Supreme Court of Florida as one of great public importance.<sup>832</sup> Thus, there was then pending in the Supreme Court of Florida the certification of conflict with *Lantz* by the Fourth District, in *Fields I*, and the certification by the Fifth District in *Applegate I*.<sup>833</sup> On December 11, 2008, the Supreme Court of Florida, in *Fields II*, enunciated, as a matter of first impression, a public policy exception to the general rule that pre-injury releases are enforceable if they are not ambiguous and not equivocal.<sup>834</sup> The facts of the *Fields II* were that fourteen-year-old Christopher Jones was fatally injured at Thunder Cross Motor Sports Park (Park) after he was ejected from the all terrain vehicle he was driving when he lost control of it.<sup>835</sup> His father, “Bobby Jones, as Christopher’s natural guardian, [had earlier] signed a release and waiver of liability, assumption of risk, and indemnity agreement” with the attraction’s operator.<sup>836</sup> Fields, as personal representative (Personal Representative) of Christopher’s estate, sued the owners and the operators of Park (Park Owner) for wrongful death.<sup>837</sup> Park Owner argued that the claim was barred because of the execution of the release.<sup>838</sup> The trial court agreed and granted Park Owner’s summary judgment motion.<sup>839</sup> Personal Representative appealed, and the Fourth District Court of Appeal reversed, certifying the case to the Supreme Court of Florida.<sup>840</sup> In reaching its decision in *Fields II*, the Supreme Court balanced the well-recognized right of parents to make decisions for their minor children—said by the Court to “derive[] from the liberty interest . . . in the Fourteenth Amendment to the United States Constitution and the guarantee of privacy in article I, section 23 of the Florida Constitution”—against the State’s *parens patriae* authority.<sup>841</sup> After reviewing the case law from Florida and other jurisdictions, the Court decided that the State’s *parens patriae* authority prevailed in this case, and that as a matter of public policy, a “pre-injury release executed by a parent on behalf of their minor child is unenfor-

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So. 2d 349 (Fla. 2008). The Fifth Circuit did not address this issue when it reached the conclusion that the language there was sufficiently “clear and unequivocal.” *Id.* In any event, the decision in *Lantz* has now been disapproved by the Supreme Court of Florida. See Kirton v. Fields (*Fields II*), 997 So. 2d 349, 358 (Fla. 2008).

832. *Applegate I*, 974 So. 2d at 1116.

833. *Id.*; Fields v. Kirton (*Fields I*), 961 So. 2d 1127, 1130 (Fla. 4th Dist. Ct. App. 2007).

834. *Fields II*, 997 So. 2d at 358; *Lantz*, 717 So. 2d at 591–92 (citing Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc., 705 So. 2d 120, 121 (Fla. 5th Dist. Ct. App. 1998)).

835. *Fields II*, 997 So. 2d at 351 (quoting *Fields I*, 961 So. 2d at 1128).

836. *Id.* (quoting *Fields I*, 961 So. 2d at 1128).

837. *Id.*

838. *Id.*

839. *Id.*

840. *Fields II*, 997 So. 2d at 351–52.

841. *Fields II*, 997 So. 2d at 352–53 (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

ceable” by commercial enterprises.<sup>842</sup> However, the Court was careful to note that even in the case of commercial enterprises, a parent could bind a minor child to arbitrate, rather than litigate, personal injury claims.<sup>843</sup> The Court did not decide if such releases will be upheld in the case of non-commercial activities, nor did it set forth a test to determine what is classified as non-commercial activity as opposed to commercial activity, although there was an in-depth discussion of decisions involving non-commercial activities.<sup>844</sup> In a concurring opinion, Justice Pariente made it clear that she did not hold the view “that all releases from liability for non-commercial activities are automatically valid,” and that there is still room to hold a non-commercial activity liable for negligence in the face of a release.<sup>845</sup> Justice Wells dissented on the ground that it will often prove very difficult to draw a bright line distinction between commercial and non-commercial activities.<sup>846</sup> According to Justice Wells, it is the legislature’s duty to take up the issue of the enforceability of pre-injury releases executed by parents on behalf of their minor children.<sup>847</sup>

With respect to *Applegate II*, after the Court’s decision in *Fields II*, it declined to review *Applegate I*.<sup>848</sup>

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842. *Id.* at 358.

843. *See id.* at 355 (quoting *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 404 (Fla. 2005)).

844. *See id.* at 356–57.

845. *Id.* at 361–62 (Pariente, J., concurring).

846. *Fields II*, 997 So. 2d at 363 (Wells, J., dissenting). An example discussed in the case questions whether “a Boy Scout or Girl Scout, YMCA, or church camp [is] a commercial establishment or a community-based activity.” *Id.*

847. *Id.* Pertinent legislation introduced in the Florida House of Representatives and the Senate after *Fields II* was not passed. *See* Florida House of Representatives, Legislative Tracking: Fla. HB 363 (2009), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=40275&BillText=363&HouseChamber=H&SessionId=61&>. HB 363 was introduced on January 14, 2009 but “[d]ied on [Unfinished Business] Calendar” on May 2, 2009. *Id.* The bill

[a]uthorize[d] natural guardians to waive [and] release, in advance, any claim or cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf; provid[ed] that such waivers [and] releases are disfavored [and] must be strictly construed against party claiming to be relieved of liability; provide[d] readability requirements for wording of such waivers [and] releases, etc.

*Id.* A related bill, SB 886, was also withdrawn. *See* Florida Senate, Legislative Tracking: Fla. SB 886 (2009), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=40472&BillText=363&HouseChamber=H&SessionId=61&>.

848. *Cable Water Ski, LLC v. Applegate (Applegate II)*, 5 So. 3d 668, 668 (Fla. 2009).

## XVI. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

A. *Statute of Limitations on Debt Deficiency Collection*

Ms. Arvelo (Borrower) bought a car and obtained auto financing from Park Finance of Broward, Inc. (Lender) in 1999.<sup>849</sup> The finance agreement provided that if Borrower missed a payment to Lender, the balance of her debt would be immediately accelerated and due in full.<sup>850</sup> Borrower failed to make her March 2002 payment.<sup>851</sup> The auto was repossessed and sold by Lender on August 7, 2002.<sup>852</sup> After the debt was reduced by the amount of net sale proceeds,<sup>853</sup> Borrower still owed Lender more than \$6000 under the finance agreement.<sup>854</sup> On May 29, 2007, Lender sued Borrower in county court “for the deficiency amount plus accumulated interest.”<sup>855</sup> Borrower raised the five-year statute of limitations under section 95.11(2)(b) of the *Florida Statutes* and claimed that the limitations period commenced in March 2002 when she missed a payment.<sup>856</sup> If she was correct, then the May 29, 2007 lawsuit against Borrower was filed too late.<sup>857</sup> Lender argued that the agreement to pay the deficiency amount was tantamount to a separate debt under the deficiency provision of the agreement—whereby Borrower agreed to the deficiency if permitted by law—and the deficiency was not determined until August 2002.<sup>858</sup> Therefore, according to Lender, the lawsuit, started in May 2007, was within the five-year statute of limitations.<sup>859</sup> The county court agreed with Lender.<sup>860</sup> The appellate division of the circuit court affirmed, and Borrower petitioned the Third District Court of Appeal for a writ of certiorari which was granted.<sup>861</sup> The Court of Appeal reversed,

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849. See *Arvelo v. Park Fin. of Broward, Inc.*, 15 So. 3d 660, 662 (Fla. 3d Dist. Ct. App. 2009).

850. *Id.*

851. *Id.*

852. *Id.*

853. *Id.* Lender subtracted \$464 from the sale proceeds for expenses of repossession and sale. *Arvelo*, 15 So. 3d at 662.

854. *Id.*

855. *Id.*

856. See *id.*

857. *Id.*

858. *Arvelo*, 15 So. 3d at 662. The appellate court distinguished this situation from the rules that apply with respect to accrual of an action to foreclose on real estate. *Id.* at 663 n.4 (relying on *Chrestensen v. Eurogest, Inc.*, 906 So. 2d 343, 345 n.2 (Fla. 4th Dist. Ct. App. 2005) (citing FLA. STAT. § 702.06 (2009))).

859. *Id.* at 662.

860. *Id.*

861. *Id.*



finding that there was one debt owed by Borrower.<sup>862</sup> The deficiency amount was part of that debt.<sup>863</sup> Borrower's "post-repossession failure or refusal to pay the deficiency [did not] 'reset the clock.'"<sup>864</sup> Had Borrower voluntarily made a payment on the delinquent debt, that would have tolled the statute under section 95.05(1)(f) of the *Florida Statutes*.<sup>865</sup> The only post-default payments made resulted from repossession and sale, and that does not toll the statute of limitations.<sup>866</sup>

#### B. *Vendor's Lien on Real Estate*

In *Golden v. Woodward*,<sup>867</sup> Mr. Woodward Sr. (Transferor) and Mr. and Mrs. Golden (Transferees) entered into an "Agreement to Sell Personal Real Estate Property" in 2003 for \$109,000.<sup>868</sup> Transferees were to pay Transferor \$550 a month for seven years (\$46,200), and at the end of seven years, make a balloon payment of \$62,800.<sup>869</sup> Transferor did not take back a mortgage or other security for payment.<sup>870</sup> In 2004, Transferor gave Transferees a warranty deed for the property.<sup>871</sup> Transferor died in 2006, and Transferees stopped making payments.<sup>872</sup> The personal representative of Transferor's estate sought to have a vendor's—equitable—lien placed on the property to secure payment of the \$89,000 purchase price balance.<sup>873</sup> The basis of the claim for a vendor's lien was to prevent unjust enrichment.<sup>874</sup> The trial court granted the lien, and the First District Court of Appeal affirmed.<sup>875</sup> A vendor's lien "is 'a creature of equity, a lien implied to belong to a vendor for the unpaid purchase price of land, where he has not taken any other lien or security beyond the personal obligation of the purchaser.'"<sup>876</sup> Equitable liens

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862. *Arvelo*, 15 So. 3d at 662.

863. *Id.*

864. *Id.* at 663.

865. *See id.*

866. *Id.*

867. 15 So. 3d 664 (Fla. 1st Dist. Ct. App. 2009).

868. *See id.* at 666.

869. *Id.*

870. *See id.*

871. *Golden*, 15 So. 3d at 667.

872. *See id.*

873. *Id.* at 666.

874. *See id.* at 667.

875. *Id.* at 668, 671.

876. *Golden*, 15 So. 3d at 669 (quoting *Special Tax Sch. Dist. No. 1 of Orange County v. Hillman*, 179 So. 805, 809 (Fla. 1938)).

may be granted on the basis of estoppel or unjust enrichment.<sup>877</sup> The 2003 agreement between Transferor and Transferees did not disappear by merger with the 2004 warranty deed.<sup>878</sup> Although merger of the sales contract into the later deed is the general rule, it is not absolute and did not apply under the facts of this case since that was not the intention of the parties.<sup>879</sup>

### C. Jurisdiction over Loan Guarantors

Whitney National Bank (Bank) sued three individuals (Guarantors) who resided in Tennessee, seeking to enforce their loan guarantees.<sup>880</sup> The borrower was a Florida corporation that allegedly was in default on the loan.<sup>881</sup> Guarantors claimed that Bank could not obtain personal jurisdiction over them under Florida's long-arm statute, section 48.193 of the *Florida Statutes*, because they were not residents of Florida, had "never engaged in business in Florida," and did not, individually, own Florida real estate.<sup>882</sup> Furthermore, they all signed the guaranty in Tennessee, and there was nothing in the guaranty that called for any performance or action by them in Florida.<sup>883</sup> Guarantors had provided financial statements to Bank.<sup>884</sup> The trial court determined that the long-arm statute was satisfied.<sup>885</sup> The First District Court of Appeal reversed.<sup>886</sup> The plaintiff must prove the defendant's "minimum contacts" with Florida to comply with due process requirements.<sup>887</sup> Simply signing a loan guaranty in favor of a Florida bank is not sufficient "minimum contacts."<sup>888</sup> The appellate court noted that there was no forum selection clause in the guaranty, but even if there had been, it was still necessary to establish minimum contacts with the forum state absent a waiver of personal

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877. *Id.* (quoting *Plotch v. Gregory*, 463 So. 2d 432, 436 n.1 (Fla. 4th Dist. Ct. App. 1985)).

878. *See id.* at 671.

879. *Id.*; *see Polk Bond & Mortgage Co. v. Dwiggin*, 147 So. 855, 857 (Fla. 1933); *Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d Dist. Ct. App. 1967).

880. *See Labry v. Whitney Nat'l Bank, AB9G, LLC*, 8 So. 3d 1239, 1239 (Fla. 1st Dist. Ct. App. 2009).

881. *Id.*

882. *Id.* at 1240–41.

883. *Id.* at 1241.

884. *Id.*

885. *See Labry*, 8 So. 3d at 1239.

886. *Id.* at 1242.

887. *Id.* at 1240.

888. *Id.* at 1241 (citing *Holton v. Prosperity Bank of St. Augustine*, 602 So. 2d 659, 662–63 (Fla. 5th Dist. Ct. App. 1992)). *Contra Kane v. Am. Bank of Merritt Island*, 449 So. 2d 974, 975–76 (Fla. 5th Dist. Ct. App. 1984).

jurisdiction.<sup>889</sup> The fact that financial statements were furnished by the guarantors to the Florida creditor made no significant difference.<sup>890</sup>

#### D. *Enforcement of Foreign Judgment*

Creditor sought recognition, in the Miami-Dade Circuit Court, of Creditor's judgment for \$236,900 against Debtor obtained from a court in Argentina.<sup>891</sup> The trial court entered judgment for the amount of the foreign judgment, and Debtor filed an appeal with the Third District.<sup>892</sup> Debtor also persuaded the trial judge to stay enforcement of the judgment during the appeal.<sup>893</sup> The Third District Court of Appeal reversed.<sup>894</sup> While the trial court may consider a stay pursuant to rule 9.310 of the *Florida Rules of Appellate Procedure*, under section 55.607 of the *Florida Statutes*, a stay here would only have been proper if the debtor had "satisfie[d] the [trial] court that an appeal is pending," or that the debtor "intend[ed] to appeal"—but only if a stay has been issued by the foreign court.<sup>895</sup> The trial judge should have followed the Florida Uniform Out-of-Country Foreign Money-Judgment Recognition Act.<sup>896</sup> The Uniform Act requires that domesticated foreign judgments be enforced in the same way as a judgment rendered by a court in Florida.<sup>897</sup>

### XVII. WILLS, TRUSTS, AND ESTATES

The following is an update on two homestead cases mentioned in the 2006–2007 Survey.<sup>898</sup> On rehearing en banc in *Cutler v. Cutler*,<sup>899</sup> the Third District Court of Appeal again affirmed the trial court's decision that the decedent's residence, which she had conveyed to a land trust not long before her death and that was to be distributed on her death to her estate for further

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889. *Labry*, 8 So. 3d at 1241–42 (citing *Hamilton v. Bus. Assistance Consortium, Inc.*, 602 So. 2d 619, 621 (Fla. 3d Dist. Ct. App. 1992)).

890. *Id.* at 1242.

891. *See Tettamanti v. Opcion Sociedad Anonima*, 34 Fla. L. Weekly D917, D917 (3d Dist. Ct. App. May 6, 2009) (per curiam).

892. *Id.*

893. *Id.*

894. *Id.*

895. *Id.* (quoting FLA. STAT. § 55.607 (2009)).

896. *See* FLA. STAT. §§ 55.601–.607; *Tettamanti*, 34 Fla. L. Weekly at D917.

897. *See Tettamanti*, 34 Fla. L. Weekly at D917. The appellate court noted that it would then be necessary that a bond be posted by Debtors under rule 9.310 of the *Florida Rules of Appellate Procedure*. *Id.*

898. Landau, *2006-2007 Survey*, *supra* note 590, at 119 n.1272, 121 n.1294.

899. 994 So. 2d 341 (Fla. 3d Dist. Ct. App. 2008).

distribution under the terms of her will to her daughter, did not, merely by being held in the trust, lose its status as protected homestead.<sup>900</sup> The residence, however, did lose its protected homestead status by virtue of a provision in the decedent's will that provided that the property could be used to pay claims against her estate in the event that her residuary estate was insufficient.<sup>901</sup> The appellate court noted that the specific direction in her will, that the home be used to satisfy debts if the residuary was insufficient, "was the equivalent of ordering [the home] sold and the proceeds distributed to pay debts."<sup>902</sup> Thus, under Florida law, the property lost its status as protected homestead.<sup>903</sup> Judge Shepherd dissented.<sup>904</sup>

In another case decided at about the same time as *Cutler, Phillips v. Hirshon*,<sup>905</sup> the Third District Court of Appeal held that for purposes of limitations on and rules regarding devise and descent, a cooperative apartment is not homestead, but certified the conflict to the Supreme Court of Florida.<sup>906</sup> The Supreme Court initially accepted jurisdiction, but then reversed its decision to review the matter.<sup>907</sup>

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900. *See id.* at 342.

901. *Id.* at 345.

902. *Id.*

903. *Id.* at 346–47.

904. *See Cutler*, 994 So. 2d at 347 (Shepherd, J., dissenting).

905. 958 So. 2d 425 (Fla. 3d Dist. Ct. App. 2007).

906. *Id.* at 430–31.

907. *Levine v. Hirshon*, 980 So. 2d 1053, 1053 (Fla. 2008) (per curiam).

## 2008–2009 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ\*

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## I. INTRODUCTION

This survey examines the key developments in constitutional, statutory, regulatory, administrative, and case law governing public employment in Florida during 2008–09. Part II looks at such hiring issues as privatization, background checks, nepotism, immigration, ethics, budget cuts, employment-related torts, and jobs of the future. Part III, Terms of Employment, covers a wide array of issues, such as hours and wages, health benefits, workers' compensation, unemployment compensation, public pensions, safety issues, the Internet, public union issues and the Family Medical Leave Act. Part IV addresses legal issues involving discipline, retaliation against whistle-blowers, the False Claims Act, layoffs, furloughs and tenure issues. Finally, Part V, Employment Discrimination, surveys the major developments in the past year involving affirmative action, bias on grounds of gender, age, disability, religion, a new federal law regulating genetic testing and remedies.

## II. HIRING ISSUES: INTRODUCTION

Employers recruit employees through a wide array of methods: want ads; "Internet job postings; 'help wanted' signs placed in storefronts, employment agencies, executive search firms, union hiring halls, job fairs, college placement offices; referrals from state employment services; and word of mouth."<sup>1</sup> In Florida, as elsewhere, help wanted advertising has shifted to the Internet.<sup>2</sup>

### A. *Special Programs for Hiring Veterans and Mid-Career Teachers*

In 2008, the Department of Labor's (DOL) Veterans' Employment and Training Service published a final rule entitling veterans of the United States Armed Services and spouses of some veterans to enjoy priority for employment, training, and placement services within DOL job training programs.<sup>3</sup>

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1. DAVID J. WALSH, EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE 78 (2004).

2. See *Number of Jobs Advertised Online in Fla. Is Up*, MIAMI HERALD, June 10, 2009, at C3. "The number of jobs advertised online in the state was up by 5700 to 164,500 . . ." *Id.* Moreover, the unemployed are flocking to social networking sites such as Twitter to seek "job leads and listings." Bridget Carey, *Can You Tweet Your Way to a New Job?*, MIAMI HERALD, July 28, 2009, at A1.

3. See 20 C.F.R. § 1010.100 (2009). While traditionally veterans enjoy "lower unemployment rates than nonveterans," in recent years, veterans "in their 20s have faced higher unemployment rates" than nonveterans. Lizette Alvarez, *Newest Veterans Hit Hard by Economic Crisis*, N.Y. TIMES, Nov. 18, 2008, at A1.

The rule implements section 2(a)(1) of the 2002 Jobs for Veterans Act and section 605 of the 2006 Veterans' Benefits, Health Care, and Information Technology Act.<sup>4</sup>

By 2013, over one-third of the United States' "3.2 million teachers could retire, . . . a loss of talent that costs school districts millions in recruiting and training expenses."<sup>5</sup> To meet this challenge, "teacher preparation programs geared toward job-changers is rising sharply."<sup>6</sup> For example, "[t]he New Teacher Project . . . oversees Teaching Fellows programs . . . established to eliminate the achievement gap by recruiting career-changers and college graduates to work in inner-city schools. Applications . . . are up 80 percent over [2008]."<sup>7</sup>

### B. *Privatization*

While the drive to privatize governmental entities such as schools and prisons was at its peak in the 1980s and 90s,<sup>8</sup> the 2009 economic stimulus bill unintentionally dampened interest in this practice.<sup>9</sup> Nevertheless, locally, several governmental agencies have been privatized in the past year, usually in an effort to cut costs.<sup>10</sup> For example, "[a] private company will take over adult day-care offered through Pembroke Pines' popular adult day-care center, one of several city functions jettisoned to the private sector to save money" in 2009.<sup>11</sup>

At times, Florida legislators' efforts to prevent privatization raise conflict of interest questions.<sup>12</sup> For example, when a private company sought to privatize a Florida state hospital, a vocal opponent, a state lawmaker, "never

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4. 20 C.F.R. § 1010.100. The final rule was published in the Dec. 19, 2008 issue of the *Federal Register*. Priority of Service for Covered Persons, 73 Fed. Reg. 78,132 (Dec. 19, 2008) (to be codified at 20 C.F.R. pt. 1010).

5. Sam Dillon, *Report Envisions Shortage of Teachers as Retirements Escalate*, N.Y. TIMES, Apr. 7, 2009, at A16.

6. Michael Alison Chandler, *Business Is Brisk for Teacher Training Alternatives*, WASH. POST, July 31, 2009, at B1.

7. *Id.*

8. See David W. Breneman, *For Colleges, This Is Not Just Another Recession*, CHRON. HIGHER EDUC. (Wash., D.C.), June 14, 2002, at B7.

9. Leslie Wayne, *Politics and the Financial Crisis Slow the Drive to Privatize*, N.Y. TIMES, June 5, 2009, at B3.

10. See *id.*

11. Diana Moskovitz, *City Will Outsource Senior Care*, MIAMI HERALD, Aug. 5, 2009, at B1.

12. See Shannon Colavecchio, *Hospital Privatization Is a Special Issue for Lawmaker*, MIAMI HERALD, Apr. 15, 2009, at B6.



mentioned her family-owned assisted living facility's relationship with the state hospital."<sup>13</sup>

Seminole County, Florida, in an effort to cut costs, is privatizing its libraries and there is no assurance that "a private company might keep existing employees or hire its own staff."<sup>14</sup>

"The contract to centralize and consolidate the state's massive payroll system was one of the first large-scale privatization efforts to draw fire in Florida, in 2002."<sup>15</sup> Controversy over the privatization of the state's payroll system continues in 2009: "The state's decision to consider a no-bid contract extension for a controversial human-resources company has renewed criticism from a leading state senator who says privatization initiatives have cost taxpayers \$200 million with little to show for the money."<sup>16</sup>

Florida "privatized prison health care several years ago, but a legislative watchdog agency said in a report [in] January [2009] that the change has yielded 'mixed results.'"<sup>17</sup> In 2009, the Department of Corrections decided to replace the vendor with a rival even though this new company "would charge the state \$5.5 million more for the same service over a five-year period."<sup>18</sup> The ousted vendor has sued the state accusing it "of illegally favoring a competitor."<sup>19</sup>

### C. Background Checks

In 2008, President Bush issued an executive order, framing rules for the presidential transition that, for the first time, allowed background checks on prospective presidential appointees to begin before the November 4, 2008 election.<sup>20</sup>

In 2009, labor and employee advocacy groups urged the U.S. Equal Employment Opportunity Commission (EEOC) to investigate, among other entities, a government career center to see if it was violating Title VII by

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13. *Id.*

14. Dennis Boyle, *Seminole County to Privatize the Library?*, EXAMINER.COM, June 14, 2009, <http://www.examiner.com/x-10758-seminole-county-Liberal-Examiner~y2009m6d14-seminole-county-to-Privatize-the-Library>.

15. Marc Caputo, *No-bid Contract Draws Fire Again*, MIAMI HERALD, June 4, 2009, at B3.

16. *Id.*

17. Steve Bousquet, *State Accused of 'Secret' Deal*, MIAMI HERALD, June 6, 2009, at B1.

18. *Id.*

19. *Id.*

20. See Exec. Order No. 13,476, 73 Fed. Reg. 60,605, 60,606 (Oct. 9, 2008).

barring individuals with arrest or conviction records from securing bank clerical jobs.<sup>21</sup>

Under the Federal Health Care Quality Improvement Act,<sup>22</sup> hospitals are required to report to a national database when a physician resigns from privileges at the hospital while under investigation.<sup>23</sup> The aim of this rule is to bar incompetent physicians from moving from one state to another without the second state being aware of prior problems.<sup>24</sup>

“Broward County rules stipulate that felons convicted of any crime are not supposed to be hired for positions where they would have contact with children.”<sup>25</sup> In 2009, “Broward County officials are investigating how a registered sex offender managed to get a job at the Quiet Waters Park marina, where he allegedly molested a 10-year-old girl.”<sup>26</sup>

Florida law requires background screenings for “noninstructional contractor[s] who [are] permitted access to school grounds.”<sup>27</sup> A federal district court in Florida, in 2008, issued a temporary injunction barring a contractor, who had pled *nolo contendere* to child abuse charges, “from entering onto School Board property.”<sup>28</sup> The court rejected the contractor’s claim that the statute was “unconstitutional as applied to him,” because the statute was enacted after his *nolo contendere* plea and “retroactively convert[ed] his *nolo contendere* plea into a conviction.”<sup>29</sup>

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21. See Letter from All of Us or None et al. to Stuart J. Ishimaru, Acting Chairman, EEOC (June 9, 2009), available at [http://nelp.3cdn.net/aa8a86751197fa03ef\\_z2m6b5abc.pdf](http://nelp.3cdn.net/aa8a86751197fa03ef_z2m6b5abc.pdf). “Chicago, Boston, San Francisco, Baltimore, Minneapolis, and St. Paul, Minn. . . . have adopted [a] ‘ban the box’ polic[y]” when it comes to hiring applicants with criminal records. *EEOC Weighs Guidance on Employers’ Use of Criminal Records in Employment Decisions*, 77 U.S.L.W. 2335, 2335 (2008). Under this system, the criminal conviction issue is deleted from the employment application, and the issue is dealt with later in the hiring process. *Id.*

22. Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, 100 Stat. 3784 (codified as amended in scattered sections of 42 U.S.C.).

23. *Doe v. Leavitt*, 552 F.3d 75, 77 (1st Cir. 2009) (citing 42 U.S.C. § 11133(a)(1)(B)(i) (2006)).

24. *Id.* at 83 (citing 42 U.S.C. § 11101(2) (2006)). In *Leavitt*, the First Circuit ruled that an investigation of a physician, “as [the] word is used in the [Health Care Quality Improvement Act], . . . ends only when a health care [provider’s] decision-making authority either takes a final action or formally closes the investigation.” *Id.* at 86.

25. Sofia Santana & Scott Wyman, *Park Employee Was Convicted Sex Offender*, SUN-SENTINEL, July 23, 2009, at B8.

26. *Id.*

27. FLA. STAT. § 1012.467(2)(a) (2008).

28. *Sch. Bd. of Miami-Dade v. Carralero*, 992 So. 2d 353, 354 (Fla. 3d Dist. Ct. App. 2008).

29. *Id.* at 355.

In 2009, the Jacksonville city council enacted an ordinance, which among other things, requires employers “contracting with the city . . . to identify potential job opportunities for ex-offenders” and try to hire them.<sup>30</sup>

#### D. *Nepotism*

Florida’s anti-nepotism law generally prohibits public employers from hiring members of their families or other relatives.<sup>31</sup> Pembroke Pines officials may have violated Florida’s anti-nepotism law by giving “a commissioner’s daughter a job managing the city’s art studios.”<sup>32</sup> Moreover, “[t]he newly created job was never publicly advertised.”<sup>33</sup>

#### E. *Immigration*

In 2009, Congress passed a law forcing banks receiving “federal bailout money to hire [U.S.] citizens over foreign guest workers.”<sup>34</sup>

In 2009, the Labor Secretary suspended regulations enacted “by the Bush administration [governing] wages and recruitment of immigrant guest workers for agriculture.”<sup>35</sup>

In 2009, the Department of Homeland Security issued new rules governing employers receiving Troubled Asset Relief Program funds who seek to hire foreign workers under the H-1B visa program.<sup>36</sup> The number of guest workers admitted to the United States under the H-1B temporary visa program for skilled workers dropped in fiscal year 2008 by eleven percent.<sup>37</sup> The sharp drop in H-1B visa applications was attributed “to the economic

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30. G. Thomas Harper, *Local Ordinances Update*, FLA. EMP. L. LETTER, June 2009, at 2.

31. FLA. STAT. §§ 112.3135(2)(a), 760.10(8)(d) (2009). In an unusual case, the Kansas City, Missouri City Council enacted an anti-nepotism ordinance barring the mayor’s wife from volunteering in the mayor’s office. Andale Gross, *Kansas City Chafes Under Mayor’s Wife*, JOURNAL-GAZETTE, Dec. 8, 2008, at A12. The mayor “vetoed it, and the council overrode the veto.” *Id.* In response, the mayor sued the city, alleging the “ordinance infringed on his authority.” *Id.*

32. Jennifer Golan, *Daughter Hired for City Job*, MIAMI HERALD, July 27, 2009, at B3.

33. *Id.*

34. Rob Hotakainen, *Skilled Foreigners Hurt for Jobs*, MIAMI HERALD, May 1, 2009, at A3.

35. Julia Preston, *Rule Change for Workers on Farms*, N.Y. TIMES, May 29, 2009, at A15.

36. *CIS Announces New Requirements for TARP Recipients on Hiring H-1B Workers*, 77 U.S.L.W. 2588, 2588–89 (2009).

37. RANDALL MONGER & MACREADIE BARR, NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2008, 2009 OFF. OF IMMIG. STAT. ANN. REP. 4, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ni\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_fr_2008.pdf).

downturn and to new restrictions on [banks] that received” federal bailout aid.<sup>38</sup>

In 2009, the Department of Labor’s Administrative Review Board ruled that a consulting group that neglected to pay a nonimmigrant alien worker’s salary during periods of idleness, despite knowledge of H-1B visa program rules, was liable both for back pay under the Immigration and Nationality Act,<sup>39</sup> and for a civil money penalty.<sup>40</sup>

In 2009, the Department of Homeland Security Secretary, Janet Napolitano, said “DHS will ‘strengthen employment eligibility verification’ by . . . mandating the use of E-Verify by federal contractors and by [ending] the . . . ‘no match’ regulation.”<sup>41</sup> In 2008, the Department of Homeland Security modified the list of approved identity documents for the I-9 employment eligibility verification process.<sup>42</sup> Under the new rule, only unexpired documents may be accepted during the verification process.<sup>43</sup>

In 2009, the Department of Homeland Security promulgated new rules shifting the agency’s focus “more on criminal prosecution[s] of [employers] hiring illegal immigrants and less on work[site] raids to [arrest illegal] workers.”<sup>44</sup>

In 2009, both the Department of Labor and Department of Homeland Security issued final rules governing the hiring of aliens under the H-2A temporary agriculture system aimed at modernizing the program and enhancing worker protections.<sup>45</sup> In 2009, the Department of Labor’s Employment and Training Administration published an interim final rule, lengthening the transition period for employers to comply with new recruitment rules governing H-2A visas.<sup>46</sup> In 2009, the Department of Labor proposed a nine-

38. Kirk Semple, *Applications for Foreign Worker Visas Are Down*, N.Y. TIMES, Apr. 9, 2009, at A18.

39. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2000 & Supp. V 2007).

40. *Adm’r Wage & Hour Div. v. Pegasus Consulting Group, Inc.*, No. 05-086 at 7 (Dep’t of Labor Apr. 28, 2009) (final admin. review).

41. *DHS Plans to Implement Federal Contractor E-Verify Mandate, Rescind ‘No-Match’ Rule*, 78 U.S.L.W. 2025, 2025 (2009).

42. Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76,505, 76,505 (Dec. 17, 2008) (to be codified at 8 C.F.R. pt. 274a).

43. *Id.*

44. *DHS Issues New Enforcement Guidelines Focusing on Employer Criminal Prosecution*, 77 U.S.L.W. 2666, 2666 (2009).

45. See Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., to Field Leadership 1 (June 24, 2009) (on file with author). For the DHS rule, see Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 76,891, 76,891 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 214, 215, 247a).

46. Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 17,597, 17,597 (Apr. 16, 2009) (to be codified at 20 C.F.R. pt. 655).

month delay of a final rule governing the hiring of foreign workers under the H-2A temporary agriculture system.<sup>47</sup>

In 2009, the Eleventh Circuit ruled that a federal district court should have certified a class action covering employees of Mohawk Industries on claims that the employer engaged in racketeering activity by hiring illegal workers.<sup>48</sup>

## F. *Ethics*

### 1. Supreme Court Decisions

In 2009, in *Caperton v. A.T. Massey Coal Co.*,<sup>49</sup> the Supreme Court ruled that due process required a West Virginia justice to recuse himself from a case involving a big donor to the justice's election campaign.<sup>50</sup>

### 2. Executive Orders

In 2009, President Obama signed an Executive Order enhancing ethics rules for executive branch officials by restricting the "revolving door" between government service and lobbying and prohibiting administration officials from taking gifts from lobbyists.<sup>51</sup>

### 3. Supreme Court of Florida Decisions

In 2009, the Supreme Court of Florida upheld the state's tough lobbyist ethics law, rejecting claims that it violated the constitutional separation of powers and that it "infringe[d] on the Supreme Court's authority to regulate lawyers who work as lobbyists."<sup>52</sup>

### 4. Florida Legislation

In 2009, Florida's Governor "signed into law new rules that will [restrict] state employees' ability to collect a paycheck and a pension from the

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47. *Id.*; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,110 (Dec. 18, 2008) (to be codified at 20 C.F.R. pt. 655).

48. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358–59 (11th Cir. 2009).

49. 129 S. Ct. 2252 (2009).

50. *Id.* at 2257.

51. Exec. Order No. 13,490, 74 Fed. Reg. 4673, 4673, 4678 (Jan. 21, 2009).

52. Bill Kaczor, *Justices Uphold Lobbying Ethics Law*, MIAMI HERALD, Mar. 20, 2009, at B6.

same agency.”<sup>53</sup> The law forces “retirees to wait six months before they return to work.”<sup>54</sup>

## 5. Public Disclosure Issues

“Under Florida law, anyone can request a public record for any reason and expect to get it, no questions asked. But in reality, what residents face are confused public employees and questions: Who are you? Why do you want this? Can you put your request in writing?”<sup>55</sup> The Miami Herald found that “[a]lmost 43 percent of the offices failed to comply with the law either because they required a name, reason or written request or because they weren’t able to reasonably produce a record.”<sup>56</sup>

For some time, the city of Fort Lauderdale has released a list of the top-paid employees “to make the salaries transparent, and it has continued as a unique practice for local government in South Florida. Though public salaries are a matter of public record, other governments—such as Broward and Miami-Dade counties—do not produce similar annual lists.”<sup>57</sup>

## 6. Conflict-of-Interest Issues

A report “identified 18 current and recently retired lawmakers who work for or draw income from contracts with state universities and community colleges.”<sup>58</sup> Critics claim there is an “inherent conflict of interest in having college employees sitting on committees that oversee higher education funding and policy.”<sup>59</sup> The Florida Commission on Ethics lodged an ethics complaint against a state lawmaker “in connection with his taking a \$110,000 job at his local college.”<sup>60</sup>

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53. *Crist Signs Law Restricting Double-Dipping*, MIAMI HERALD, June 19, 2009, at B5.

54. *Id.*

55. *Public-Records Is Law Frequently Violated*, MIAMI HERALD, Nov. 22, 2008, at B5.

56. *Id.* By contrast, “[a] judge ruled that the Alaska governor’s office can use private e-mail accounts to conduct state business” without violating the state’s public records law. Associated Press, *Alaska: Private E-Mail Ruling*, N.Y. TIMES, Aug. 13, 2009, at A20.

57. Amy Sherman, *Public Service Pays Off in Lauderdale*, MIAMI HERALD, Mar. 5, 2009, at A1.

58. Jennifer Liberto, Mary Ellen Klas & Steve Bousquet, *Lawmakers Cash in with Campus Jobs*, MIAMI HERALD, Dec. 21, 2008, at A1.

59. *Id.*

60. Alex Leary, *Sansom Hires Prominent Lawyer*, MIAMI HERALD, Dec. 31, 2008, at B2. “The complaint cites a Florida statute that says no public officer shall ‘corruptly use or attempt to use his or her official position to secure a special privilege, benefit of exemption for himself, herself or others.’” *Id.*

## 7. South Florida Ethics Developments

The question arose in 2009 whether Miami-Dade County officials were improperly enlisting police officers to serve as personal drivers.<sup>61</sup> In response, the Commission chairman created a new system to track commissioners' use of sergeants after an Internal Affairs review of the practice.<sup>62</sup>

The 2008 "Broward Ethics Commission has one job: draft a code of ethics to regulate commissioners' behavior. Then it ceases to exist. . . . They'll consider questions like whether gifts to commissioners should be banned, or whether they can moonlight."<sup>63</sup>

"A series of e-mails among Dania Beach commissioners discussing city businesses may have skirted Florida's open-meetings rules."<sup>64</sup>

### G. Budget Cuts

In the face of hard times, public sector employers in Florida are taking a variety of steps to cut costs, including: 1) banning "most out-of-state travel by state employees";<sup>65</sup> 2) "pay cuts for public officials making over \$100,000";<sup>66</sup> 3) reducing starting pay for firefighters by "14 percent to about \$35,000";<sup>67</sup> 4) instituting salary freezes;<sup>68</sup> 5) abolishing "year-end bonuses or holiday gifts";<sup>69</sup> 6) "quit rehiring employees who have retired";<sup>70</sup> 7) increasing all high school teaching schedules to seven-period days;<sup>71</sup> 8) "switching

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61. Matthew Haggman & Jack Dolan, *Chairman Pledges to Better Track Use of Cop-Chauffeurs*, MIAMI HERALD, Apr. 22, 2009, at A1.

62. *Id.*

63. Dan Christensen, *New Ethics Panel Gets the Green Light*, MIAMI HERALD, Nov. 5, 2008, at B3.

64. Amy Sherman, *E-Mails May Violate Sunshine Law*, MIAMI HERALD, Jan. 10, 2009, at B1. "Florida's Government-in-the-Sunshine Law forbids elected officials from privately discussing issues that could come before them as an elected body." *Id.*

65. See Steve Bousquet, *Lawmakers' Trips to Cost Public*, MIAMI HERALD, July 15, 2009, at B5. "But the travel restriction doesn't apply to lawmakers themselves . . . ." *Id.* Moreover, "[t]ravel that is related to law enforcement, military, emergency management or public health is exempt from the restriction." *Id.*

66. Amy Sherman, *Taxpayers Will Soon Pay More, Get Less*, MIAMI HERALD, July 26, 2009, at A1.

67. *Id.*

68. See Cindy Goodman, *Surviving a Pay Cut*, MIAMI HERALD, July 15, 2009, at C1.

69. Joyce M. Rosenberg, *Economic Woes Squeeze Holiday Bonuses at Work*, MIAMI HERALD, Oct. 20, 2008, at G12.

70. Nirvi Shah, *Union: Stop Rehiring Teachers*, MIAMI HERALD, Dec. 19, 2008, at B1.

71. Patricia Mazzei, *High Schools Could Get 7-Period Schedule*, MIAMI HERALD, Feb. 11, 2009, at B2.

high schools to four-day weeks”;<sup>72</sup> 9) cutting “every state worker’s salary by about 5 percent”;<sup>73</sup> and 10) colleges going “to a four-day schedule in the summer.”<sup>74</sup>

## H. *Torts Related to Hiring*

### 1. *Respondeat Superior and Florida’s Ridesharing Law*

Under Florida law, an employer is not liable for injuries sustained by third parties by employees commuting to work.<sup>75</sup> Florida’s “ridesharing law helps limit respondeat superior liability for scope of employment injuries by defining it as beginning [once the worker] arrives . . . and ending when the employee leaves work.”<sup>76</sup>

### 2. *Defamation*

Under Florida law,

[a]n employer who discloses information about a former or current employee to a prospective employer . . . upon request of the prospective employer . . . is immune from civil liability for such disclosure or its consequences unless it is shown by clear and convincing evidence that the information disclosed by the former or current employer was knowingly false.<sup>77</sup>

Employers should take note that “e-mails, Twitter, Facebook and blogs [are] making it easier to [circulate damaging] information about employees.”<sup>78</sup>

Florida’s Fifth District Court of Appeal ruled that while defamatory “[s]tatements made by employees to other employees” are usually entitled to qualified privilege, that “privilege vanishes if the statement is made with malice, or to too wide an audience.”<sup>79</sup>

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72. Patricia Mazzei, *4-Day School Week on Table*, MIAMI HERALD, Feb. 25, 2009, at B1.

73. Marc Caputo & Breanne Gilpatrick, *Pay Cuts for Workers Studied*, MIAMI HERALD, Mar. 17, 2009, at B6.

74. Luisa Yanez, *College Cuts to 4-Day Workweek to Save Cash*, MIAMI HERALD, Apr. 3, 2009, at B3.

75. See FLA. STAT. § 768.091(1) (2009).

76. Martin E. Segal, *Are We at Risk for Company Carpool Accidents?*, MIAMI HERALD, Nov. 3, 2008, at G14.

77. FLA. STAT. § 768.095.

78. Tresa Baldas, *Workplace Defamation Suits Rise*, NAT’L L.J., Apr. 13, 2009, at 1.

79. Glynn v. City of Kissimmee, 383 So. 2d 774, 776 (Fla. 5th Dist. Ct. App. 1980).



At the federal level, the District of Columbia Circuit Court of Appeals ruled in 2009 that members of Congress enjoy immunity from defamation suits for speech made within the scope of their employment.<sup>80</sup>

### 3. Negligent Hiring

Florida's Second District Court of Appeal certified the following question for review:

After the legislature created a statutory duty requiring [the Department of Children and Family Services] (DCF) to license and monitor the activities of substance abuse counselors, does a duty in tort arise, owing by DCF to a counselor's client: (1) when DCF negligently licenses the counselor, (2) when the counselor harms a client, and (3) when the client has no relationship with DCF greater than that of any other citizen?<sup>81</sup>

It turned out that a Florida Power and Light (FPL) employee who drilled a hole in a nuclear plant pipe causing huge losses "had a long criminal record."<sup>82</sup> Nevertheless, the Nuclear Regulatory Commission (NRC) concluded "FPL was not liable because it had followed all of NRC's 'rigorous' procedures in hiring and supervising the worker."<sup>83</sup>

A Miami-Dade jury awarded \$1.2 million to a "man hit in the groin by a batting-cage pitch," concluding that the employer "negligently failed to properly supervise its employees."<sup>84</sup>

In *L.A. Fitness International, L.L.C. v. Mayer*,<sup>85</sup> a gym patron suffered a cardiac arrest while using a stair-stepping machine.<sup>86</sup> "The club manager had CPR training but decided not to administer it since he believed the injured person had suffered a stroke."<sup>87</sup> The Florida court rejected a suit for negligence in failing to properly administer CPR, concluding that "a business

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80. See *Wuterich v. Murtha*, 562 F.3d 375, 382 (D.C. Cir. 2009). Congressman John Murtha enjoyed immunity from defending a defamation suit arising from comments made to the press on civilian deaths in Haditha, Iraq. *Id.* at 377-78, 387.

81. *Dep't of Children & Family Servs. v. Chapman*, 9 So. 3d 676, 686-87 (Fla. 2d Dist. Ct. App. 2009) (alteration in original).

82. *FPL Customers Pay for Others' Mistakes*, MIAMI HERALD, Nov. 14, 2008, at A16.

83. *Id.*

84. Jennifer Lebovich, *Man Hit at Batting Cage Awarded \$1.2M*, MIAMI HERALD, Nov. 12, 2008, at B3.

85. 980 So. 2d 550 (Fla. 4th Dist. Ct. App. 2008).

86. *Id.* at 552.

87. Martin E. Segal, *Does Health Club Have Legal Obligation to Give Medical Aid?*, MIAMI HERALD, Oct. 6, 2008, at G16.

owner satisfies its legal duty to come to the aid of a patron experiencing a medical emergency by summoning medical assistance within a reasonable time.”<sup>88</sup>

### I. *Jobs of the Future*

By 2016, jobs in health care<sup>89</sup> and those requiring postsecondary education will see the largest gains while manufacturing will continue its gradual decline.<sup>90</sup> According to the Labor Department, the fastest growing occupations are systems and data analysts and home care aides.<sup>91</sup> Even though South Florida hospitals suffer from extreme shortages in nurses, until recently the high cost of housing here “saw a lot of nurses resigning, moving away from this area—to North Florida, Tennessee, Georgia, the Carolinas.”<sup>92</sup> Besides the demand for nurses, the United States economy has created demand for people with specialized skills such as pharmacists and engineers even amid a recession.<sup>93</sup>

Workers furloughed from dwindling manufacturing jobs “are training as truck drivers and welders,” jobs thought at least to last through the “deep recession.”<sup>94</sup> Moreover, “[t]he tough job market is prompting a growing number of women across the country to dance in strip clubs, appear in adult movies, or pose for magazines” such as *Hustler*.<sup>95</sup>

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88. *Id.* (quoting *L.A. Fitness Int'l, L.L.C.*, 980 So. 2d at 558).

89. See Editorial, *Caring for the Caregivers*, N.Y. TIMES, Jan. 28, 2009, at A30. “In December [2008], employers added 32,000 health-related positions [nationally].” *Id.* In 2009, “only the healthcare sector has gained jobs in South Florida.” Scott Andron & Joel Poelhuis, *Where's the Work?*, MIAMI HERALD, June 20, 2009, at A1.

90. Catherine Rampell, *Job Growth in Health Is Expected to Be Strong*, N.Y. TIMES, July 14, 2009, at B3.

91. Douglas Martin, *Evelyn Coke, 74, Dies; Home Care Aide Fought Pay Rule*, N.Y. TIMES, Aug. 10, 2009, at A16. “Home care agencies are . . . expected to employ nearly two million aides by 2014.” *Id.*

92. John Dorschner, *Nurses Lured from S. Fla.*, MIAMI HERALD, Oct. 30, 2008, at C3. “Nurses in some South Florida hospitals are now averaging over \$30 an hour, and some are getting signing bonuses of \$5,000. They can earn \$45,000 to \$69,000 a year . . .” *Id.*

93. See Christopher S. Rugaber, *Even in the Recession, Some Jobs are Out There*, ORLANDO SENTINEL, Mar. 10, 2009, at A7.

94. Louis Uchitelle, *Bad Times Spur a Flight to Jobs Viewed as Safe*, N.Y. TIMES, Jan. 25, 2009, at A1.

95. Karen Hawkins, *Recession, Unemployment Give Some Reason to Dance*, CHARLESTON GAZETTE, Mar. 23, 2009, at A6.

### III. TERMS OF EMPLOYMENT

#### A. Hours and Wages

##### 1. Fair Labor Standards Act Issues

##### a. Minimum Wage and Overtime Issues

In 2009, the Federal Government Accountability Office found that the Labor Department's Wage and Hour Division is failing in its role of "enforcing minimum wage, overtime, and many other labor laws."<sup>96</sup> But "[d]uring the first six months of the [Obama administration], the Department of Labor recovered more than \$82 million in back wages for almost 107,000 minimum-wage workers."<sup>97</sup>

On July 24, 2009, the federal minimum wage increased from \$6.55 to \$7.25 per hour.<sup>98</sup>

Owing to the "Great Recession"<sup>99</sup> in 2009, the average workweek shrank to "33 hours—the shortest ever recorded."<sup>100</sup> "Wages have fallen each month since October [2008]—a total of 5 percent over the past eight months."<sup>101</sup> "Two surveys found employers have increased salaries [in 2009] by the smallest percentage in decades . . . ."<sup>102</sup> Florida alone has seen the personal income of state residents decline for nine months—the longest in sixty-one years.<sup>103</sup> "Florida recorded a 0.9 percent fall in personal income in the first quarter of [2009], compared with the fourth quarter of 2008."<sup>104</sup>

96. Steven Greenhouse, *Labor Agency Is Failing Workers, Report Says*, N.Y. TIMES, Mar. 25, 2009, at A14.

97. Hilda Solis, *Minimum-Wage Increase Can Make a Difference*, MIAMI HERALD, July 25, 2009, at A23.

98. *Id.* "Eighteen states and the District of Columbia already have minimum wages that are higher or equal to \$7.25 an hour." *Minimum Wage Will Go Up Friday*, MIAMI HERALD, July 20, 2009, at A3.

99. Editorial, *Dangers of the D-Word*, N.Y. TIMES, Feb. 17, 2009, at A32 ("Alan Greenspan said a depression required 15 percent unemployment for three to nine months or 12 percent unemployment for nine months or more. . . . President Ronald Reagan said: 'A recession is when your neighbor loses his job. A depression is when you lose yours.'").

100. Roger Lowenstein, *The New Joblessness*, N.Y. TIMES MAG., July 26, 2009, at 11, 12.

101. Christopher Leonard, *Any Job at All, Just to Pay the Bills*, MIAMI HERALD, Aug. 8, 2009, at C4 [hereinafter Leonard, *Any Job at All*]. In the private sector with 109 million jobs, during the last 10 years, the annual growth rate for jobs was an anemic 0.01 percent. Floyd Norris, *Job Growth Lacking in the Private Sector*, N.Y. TIMES, Aug. 8, 2009, at B3.

102. *Raises Among Tiniest*, MIAMI HERALD, July 22, 2009, at C1.

103. Harriet Johnson Brackey, *Personal Income Slides*, SUN-SENTINEL, June 19, 2009, at D1.

104. *Id.*

“Florida’s first-quarter decline was larger than income cuts in all but seven states.”<sup>105</sup> One report “ranks South Florida No. 85 among the nation’s 100 largest metropolitan areas in economic performance, as of March 2009, based on employment, unemployment rates, wages, gross metropolitan product, housing prices, and foreclosure rates.”<sup>106</sup> According to the Commerce Department, Florida “ranked 45th among the 50 states for growth in per-person income.”<sup>107</sup> In Florida, per-capita income for 2008 “was \$39,070, up 1.7 percent from \$38,417 the previous year.”<sup>108</sup> “National per-capita income [in 2008] was \$39,751, up 2.9 percent from the previous year.”<sup>109</sup>

The plight of home health care workers drew renewed attention with the death of Evelyn Coke who sued “[i]n a case that reached the Supreme Court in 2007 . . . to reverse federal labor regulations that exempt home care agencies from having to pay overtime.”<sup>110</sup> Although the Court rejected her claim, in 2009, “15 senators and 37 House members wrote to Hilda L. Solis, secretary of labor, urging her to eliminate the exemption for home attendants.”<sup>111</sup>

In 2009, the Department of Labor’s Wage and Hour Division issued the following opinion letters: 1) a letter making clear that an employer may insist that employees who are exempt from the minimum wage and overtime provisions of the Fair Labor and Standards Act (FLSA) use their accrued vacation time amid a temporary plant closure without losing their exempt status or violating the FLSA;<sup>112</sup> and 2) three opinion letters making clear that employers assessing whether time spent by employees in training is compensable under the FLSA, must consider the timing and goal of the training and its relationship to a worker’s usual duties.<sup>113</sup>

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105. *Id.*

106. Clifford M. Marks, *Report: South Florida Recovery May Be Near*, MIAMI HERALD, June 17, 2009, at C1.

107. Scott Andron, *Income Trails Inflation*, MIAMI HERALD, Mar. 25, 2009, at C3.

108. *Id.*

109. *Id.*

110. Martin, *supra* note 91.

111. *Id.*

112. Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Standards Admin., Wage & Hour Div., No. FLSA2009-2, 1 (Jan. 14, 2009), available at [http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009\\_01\\_14\\_02\\_FLSA.pdf](http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_14_02_FLSA.pdf).

113. Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Standards Admin., Wage & Hour Div., No. FLSA2009-1, 1 (Jan. 7, 2009), available at [http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009\\_01\\_07\\_01\\_FLSA.pdf](http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_07_01_FLSA.pdf); Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Standards Admin., Wage & Hour Div., No. FLSA2009-13, 2 (Jan. 15, 2009), available at [http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009\\_01\\_15\\_13\\_FLSA.pdf](http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_13_FLSA.pdf); Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Stan-

Under proposed federal legislation, the Civil Rights Act of 2008, compensatory and punitive damages would be recoverable under the FLSA.<sup>114</sup> The bill would also amend the Equal Pay Act “to make it more difficult for employers to use the ‘bona fide factor other than sex’ defense.”<sup>115</sup>

Sugar companies invoked a nineteenth century Florida law requiring workers suing for back wages to each post a \$100 bond.<sup>116</sup> Critics contend “‘the de facto function of the bond is to [bar court] access . . . on the basis of poverty.’”<sup>117</sup>

The Eleventh Circuit ruled that plaintiffs who were employed as either firefighter/emergency medical technicians or rescue supervisors fell within an exemption from overtime applicable to employees who engage in fire protection activities where plaintiffs “have been trained in fire suppression, have been issued ‘turn-out’ gear, and can be required on pain of disciplinary action to engage in fire suppression.”<sup>118</sup>

The City of Fort Lauderdale plans to cut overtime pay to its police officers from \$6.1 million in 2009 to less than \$2 million in the future.<sup>119</sup>

“Some employment lawyers anticipate more salespeople who work on commission will be filing lawsuits over pay issues such as minimum-wage violations as layoffs climb in the faltering economy.”<sup>120</sup>

#### b. *Child Labor Issues*

“Businesses at three South Florida malls let 50 underage employees operate dangerous equipment” in violation of the FLSA’s provisions governing child labor.<sup>121</sup> “Although it’s legal to employ minors in most workplaces, federal law prohibits them from performing certain jobs deemed dangerous, such as roofing, coal mining, operating a meat slicer, making explosives, using power saws and scrap compacting.”<sup>122</sup>

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dards Admin., Wage & Hour Div., No. FLSA2009-15, at 2 (Jan. 15, 2009), available at [http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009\\_01\\_15\\_15\\_FLSA.pdf](http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_15_FLSA.pdf).

114. John B. Phillips, *The Obama White House and HR: Possible Changes Based on Pending Laws*, FLA. EMP. L. LETTER, Dec. 2008, at 6.

115. *Id.*

116. Laura Wides-Munoz, *Cane Workers See Last Chance to Recover Fla. Wages*, ASSOCIATED PRESS, June 5, 2009.

117. *Id.*

118. *Gonzalez v. City of Deerfield Beach*, 549 F.3d 1331, 1334–36 (11th Cir. 2008).

119. Brittany Wallman, *Police Overtime Pay Being Cut*, MIAMI HERALD, May 26, 2009, at B3.

120. Patrick Danner, *Car Salespeople See Less Pay*, MIAMI HERALD, Jan. 21, 2009, at C3.

121. Evan S. Benn & Laura Figueroa, *Teen Labor Violations Cited*, MIAMI HERALD, Jan. 24, 2009, at B3.

122. *Id.*

### c. *Proposed Paid Vacation Act*

In 2009, a Florida congressman introduced a bill—the Paid Vacation Act—that would make paid vacation a requirement under the FLSA.<sup>123</sup> Employers of more than one hundred employees would be required to give full-time and part-time employees a week of paid vacation after working one year.<sup>124</sup> Three years after the law is in place, employees who put in one year would be entitled to two weeks of paid vacation, but employers with “50 or more employees” would only have to provide one week.<sup>125</sup>

A 2009 survey found that thirty-four percent of U.S. employees will not “use all of their earned vacation time in 2009,” citing work-related pressures.<sup>126</sup> Employees “will give back an average of three vacation days each.”<sup>127</sup> “[W]omen are more likely than men to feel guilty about taking time off from work.”<sup>128</sup>

## 2. Lilly Ledbetter Fair Pay Act

In 2009, Congress overturned the Supreme Court ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>129</sup> by enacting the Lilly Ledbetter Fair Pay Act,<sup>130</sup> making clear that the deadline for filing a claim of pay discrimination under Title VII runs from when an employee receives unequal pay, not from the time the employer first decided to discriminate.<sup>131</sup> But one “South Florida labor lawyer says until women make different choices, their incomes won’t rise, no matter how many bills are signed into law. By choices, he’s talking about the careers they pursue, the hours they work, the jobs within their industries they hold and the parenting decisions they make.”<sup>132</sup>

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123. Paid Vacation Act of 2009, H.R. 2564, 111th Cong. (2009).

124. H.R. 2564 § 3(c)(1).

125. H.R. 2564 § 3(c)(2).

126. G. Thomas Harper, *Workplace Trends*, FLA. EMP. L. LETTER, June 2009, at 6.

127. *Id.*

128. *Id.*

129. 550 U.S. 618 (2007).

130. Lilly Ledbetter Fair Pay Act of 2009, S. 181, 111th Cong. (2009).

131. *See id.* S. 181 § 3. “A broader bill aimed at combating gender-based wage discrimination remains stalled in Congress.” Editorial, *Paycheck Fairness*, N.Y. TIMES, June 24, 2009, at A24.

132. Cindy Krischer Goodman, *Matters of Money*, MIAMI HERALD, Jan. 28, 2009, at C1 [hereinafter Goodman, *Matters of Money*].

“In one of the first decisions to interpret the scope of the . . . Fair Pay Act, a federal judge . . . refused to apply the law’s relaxed time limits to failure-to-promote claims.”<sup>133</sup>

### 3. Gender and Racial Wage Gap

“In Florida, women made no significant gains in winning top corporate jobs and even lost board director positions over the past two years.”<sup>134</sup> But “more women are advancing into the executive offices by holding the position of chief financial officer.”<sup>135</sup> “One percent of senior corporate officers are black women . . . compared with 3 percent for black men, 14 percent for white women and 77 percent for white men.”<sup>136</sup>

“[W]omen make only 77 cents for every dollar paid to men.”<sup>137</sup> In Miami-Dade County, women earn “72 cents for every dollar a man earns.”<sup>138</sup> Moreover, “wage theft, or the nonpayment of money owed for work, is rampant in Miami-Dade County. This may be because immigrant women make up 63 percent of the female workforce.”<sup>139</sup>

### 4. Farm Workers’ Wages

At the national level, “[t]ens of thousands of Mexicans who labored in the United States under a World War II-era guest worker program will be eligible to collect back pay under a settlement to a long-fought lawsuit.”<sup>140</sup> “Under the settlement . . . Mexico would give each bracero, or a surviving heir, \$3500.”<sup>141</sup>

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133. Shannon P. Duffy, *Judge: Ledbetter Act Doesn’t Apply to Lost Promotion Suit*, LAW.COM, May 27, 2009, <http://www.law.com/jsp/article.jsp?id=1202430992687> (last visited Nov. 7, 2009).

134. Cindy Krischer Goodman, *Fewer Women Winning Jobs in Executive Suites*, MIAMI HERALD, Feb. 11, 2009, at C1 [hereinafter Goodman, *Fewer Women Winning Jobs in Executive Suites*].

135. *Id.*

136. Jesse Washington, *Study: Networking Hinders Black Women Execs*, CONN. POST, Jan. 7, 2009.

137. Goodman, *Matters of Money*, *supra* note 132.

138. Cindy Krischer Goodman, *Working Women Worse Off in Dade*, MIAMI HERALD, Apr. 17, 2009, at C3 [hereinafter Goodman, *Working Women Worse Off in Dade*].

139. *Id.*

140. Pam Belluck, *Settlement Will Allow Thousands of Mexican Laborers in U.S. to Collect Back Pay*, N.Y. TIMES, Oct. 16, 2008, at A19.

141. *Id.*

In the past, Florida tomato growers refused calls for farm “workers to be paid at least another penny per pound of tomatoes picked.”<sup>142</sup> But “to combat the perception that they are not helping improve the lives of farmworkers . . . growers [have] launched the Farmworker Community Support Foundation to fund programs related to farmworkers’ child care, education and healthcare.”<sup>143</sup> Despite these efforts, “[f]arm workers from Immokalee traveled to Tallahassee to ask the state to fight ‘modern-day slavery’ and improve working conditions.”<sup>144</sup> In 2008, “five farm bosses pleaded guilty to a scheme to enslave Mexican and Guatemalan nationals as farm workers in Immokalee. Prosecutors said the farm bosses were paying the workers minimal wages and had threatened them with violence.”<sup>145</sup>

## B. *Health Benefits*

### 1. Health Insurance

“Surveys suggest that rising premiums have prompted more than half of small businesses to reduce benefits, raise deductibles or require workers to shoulder a larger share of an ever more expensive pie.”<sup>146</sup>

Since 1990, “the number of employers who have switched to self insurance has increased dramatically,” starting with big employers and spreading to smaller employers.<sup>147</sup>

### 2. Domestic Partnership Benefits

By presidential memorandum in 2009, federal employees may add same-sex domestic partners to their long-term care insurance plans and can “use their sick leave to take care of domestic partners and [their] non-biological, non-adopted children.”<sup>148</sup> Moreover, foreign service employees’

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142. Elaine Walker, *Tomato Growers Give Workers a Lift*, MIAMI HERALD, Mar. 24, 2009, at C3.

143. *Id.*

144. Breanne Gilpatrick, *Farm Workers Protest Conditions*, MIAMI HERALD, Mar. 10, 2009, at B6.

145. *Id.*

146. Kevin Sack, *Small Payroll, but Big Woes on Insurance*, N.Y. TIMES, Feb. 3, 2009, at A1.

147. HealthInsurance.info, Self-Insured Employers, <http://www.healthinsurance.info/HISELFI.HTM> (last visited Nov. 7, 2009).

148. Press Release, Office of the Press Sec’y, Fact Sheet: Presidential Memorandum on Federal Benefits and Non-Discrimination (June 17, 2009) [hereinafter Press Release, Fact Sheet] (on file with author); see Press Release, Office of the Press Sec’y, Memorandum for the Heads of Executive Dep’ts and Agencies (June 17, 2009) (on file with author).



same-sex domestic partners may use medical facilities at posts overseas, be eligible for medical evacuations, and be included in housing allocations.<sup>149</sup>

In 2009, Miami commissioners “unanimously passed a domestic partnership ordinance giving employees with same-sex or opposite-sex partners the same rights and benefits as married couples.”<sup>150</sup> “Gay activists say it’s only a matter of time before legal challenges are filed to domestic partnership laws in Miami-Dade, Broward and other parts of the state.”<sup>151</sup> Indeed, a charter amendment has already been proposed “in Hillsborough County that would pre-emptively outlaw spending taxpayer dollars on same-sex benefits.”<sup>152</sup>

### 3. Insuring the Uninsured and Underinsured

“By some estimates, about half of the nation’s uninsured are people who are self-employed or work for a small business.”<sup>153</sup> “Workers in firms with fewer than 25 workers are now twice as likely to be uninsured as those in larger firms.”<sup>154</sup> “[S]ome 70 percent of uninsured Americans come from families with one or two full-time workers.”<sup>155</sup>

More than two dozen states allow “parents to claim these [uninsured] young adults as dependents for [health] insurance purposes up to age 29.”<sup>156</sup>

“At least one-fifth of Florida’s population lacks health coverage. Florida’s uninsured rate is the third-highest in a nation where about 50 million people are uninsured . . . .”<sup>157</sup> According to a report by Families USA, more

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149. Press Release, Fact Sheet, *supra* note 148. In 2009, suit was filed in Massachusetts alleging that the federal government violates equal protection by denying same-sex couples federal benefits. Abby Goodnough & Katie Zezima, *Suit Seeks to Force Government to Extend Benefits to Same-Sex Couples*, N.Y. TIMES, Mar. 3, 2009, at A12. Although over 1100 federal laws distinguish on the basis of marital status, the lawsuit focuses on “Social Security, federal income tax, federal employees and retirees, and the issuance of passports.” *Id.*

150. Charles Rabin, *Domestic-Partner Ordinance Passed*, MIAMI HERALD, June 12, 2009, at B5.

151. Beth Reinhard, *Activists Ready to Fight Threat to Partnerships*, MIAMI HERALD, Nov. 21, 2008, at A1.

152. *Id.*

153. Reed Abelson, *Health Insurers Balk at Changes for Small Business*, N.Y. TIMES, June 3, 2009, at B1.

154. Sack, *supra* note 146.

155. Editorial, *Health Reform and Small Business*, N.Y. TIMES, Aug. 13, 2009, at A20.

156. Cara Buckley, *For Uninsured Young Adults, Do-It-Yourself Medical Care*, N.Y. TIMES, Feb. 18, 2009, at A1.

157. Marc Caputo, *Crist Touts Limited Health Plan*, MIAMI HERALD, Aug. 9, 2009, at B1 [hereinafter Caputo, *Crist Touts Limited Health Plan*].

[A]ccording to research from the Economic Policy Institute . . . 58 percent of [Floridians] under age 65 were covered by employer-sponsored plans in 2006–07 . . . down 4.2 percent since

than 3500 Floridians per week will lose healthcare coverage through 2010.<sup>158</sup> “Fewer women who work full time in Miami-Dade County have healthcare coverage from their employers than the national average.”<sup>159</sup>

Florida Governor “Crist’s new Cover Florida healthcare proposal has signed up only 3757 people in a state with nearly four million uninsured. [Meanwhile,] an estimated 77,250 Floridians have lost health-insurance coverage since Cover Florida began releasing statistics in March.”<sup>160</sup>

Blue Cross Blue Shield of Florida is offering the uninsured discount cards.<sup>161</sup> “It’s not insurance, but the program boasts it can offer discounts of 5 to 40 percent for those providers who take the card. . . . But the plan doesn’t cover hospital costs—a crucial gap if anyone . . . gets seriously ill.”<sup>162</sup> “The FamilyBlue card costs \$20 a month to get discounts on doctor visits, prescription drugs, dental care, vision care, hearing care, diabetic supplies and vitamins.”<sup>163</sup>

#### 4. Rising Health Insurance Costs

“U.S. health care spending in 2007 grew at its lowest rate in nine years, due mainly to a slowdown in prescription drug spending and lower administrative costs for the Medicare program . . . .”<sup>164</sup> “Premiums for job-based health insurance [rose] 5 percent in 2008 and have more than doubled since 1999, a growth rate that far [exceeds] inflation and the [slow rise] in workers’ wages over the same period . . . .”<sup>165</sup>

Miami ranked number one “for healthcare costs [for seniors] among the 307 metropolitan areas surveyed”—“\$16,351 a year—twice the national av-

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2000–01. For workers, 64.9 percent were covered by employer plans in 2006–07, down 4.7 percent from 2000–01. For children under 18, 54.9 percent were covered by employer plans in 2006–07, down 3.3 percent from 2000–01.

G. Thomas Harper, *Florida News in Brief*, FLA. EMP. L. LETTER, Dec. 2008, at 5.

158. See John Dorschner, *Coverage Losses Per Week in State: 3500*, MIAMI HERALD, July 16, 2009, at C2.

159. Goodman, *Working Women Worse off in Dade*, *supra* note 138. “Only 51 percent of women working full-time have healthcare coverage from their employer. The national average is 66 percent.” *Id.*

160. Caputo, *Crist Touts Limited Health Plan*, *supra* note 157. In Massachusetts, after a three year effort, “97 percent of [its] residents have health insurance—by far the highest rate in the nation.” Editorial, *The Massachusetts Model*, N.Y. TIMES, Aug. 9, 2009, at WK7.

161. See John Dorschner, *Discount Healthcare?*, MIAMI HERALD, Nov. 30, 2008, at E1.

162. *Id.*

163. *Id.*

164. Tony Pugh, *Growth Rate of Health Spending Slows in U.S.*, MIAMI HERALD, Jan. 6, 2009, at A5.

165. Tony Pugh, *Job-Based Premiums Rise 5%*, MIAMI HERALD, Sept. 25, 2008, at C1.

erage of \$8304.”<sup>166</sup> Fort Lauderdale ranked twenty-third—“with an average cost per senior of \$9,816 a year.”<sup>167</sup>

## 5. Gender and Racial Health Care Gap

A 2008 study found “a widespread gap in the cost of health insurance, [with] women pay[ing] much more than men of the same age for individual insurance policies” offering the same coverage.<sup>168</sup> “[W]omen [even] pay more than men for insurance that does not cover maternity care.”<sup>169</sup> Overweight and obese women earn less than their slimmer counterparts.<sup>170</sup> “In 1981, the thinner women earned about 4.29 percent more than their heavier counterparts. But by 2000, that difference grew to 7.47 percent . . . .”<sup>171</sup> This year, “[t]he Florida Legislature . . . may consider a bill to end one of the thorniest situations in healthcare—women paying more for health insurance than men.”<sup>172</sup>

## 6. COBRA Issues

The 2009 “federal stimulus package will pay 65 percent of the cost of COBRA health insurance for those being laid off.”<sup>173</sup> “To get the full subsidy, adjusted gross income must be less than \$125,000 if single or \$250,000 if married and filing a joint tax return.”<sup>174</sup> The subsidy ends “once income exceeds \$145,000 for singles and \$290,000 for joint filers.”<sup>175</sup> Under the 2009 American Recovery and Reinvestment Act, employers must notify all em-

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166. John Dorschner, *Miami Care Costliest in Nation*, MIAMI HERALD, Feb. 26, 2009, at C1.

167. *Id.* “Some leading South Florida doctors maintain high costs are driven by the large number of malpractice lawsuits, which increase liability insurance prices and cause many doctors to go without coverage.” *Id.*

168. Robert Pear, *Women Buying Health Policies Pay a Penalty*, N.Y. TIMES, Oct. 30, 2008, at A1.

169. *Id.* “Insurers say they have a sound reason for charging different premiums: Women ages 19 to 55 tend to cost more than men because they typically use more health care, especially in the childbearing years.” *Id.*

170. Brett Graff, *Women Make Gains by Losing Weight*, MIAMI HERALD, Feb. 15, 2009, at E1.

171. *Id.*

172. John Dorschner, *Bill Seeks Gender Equity in Insurance Premiums*, MIAMI HERALD, Mar. 1, 2009, at E1.

173. John Dorschner, *COBRA’s a Conundrum for Many Who Lose Jobs*, MIAMI HERALD, Mar. 29, 2009, at E1.

174. Eileen Ambrose, *Stimulus Package has COBRA Expense Relief*, MIAMI HERALD, Mar. 4, 2009, at C2.

175. *Id.*

ployees who were laid-off between September 1, 2008 and December 31, 2009 that they are eligible for the sixty-five percent government-funded COBRA discount.<sup>176</sup> The premium reduction ends 1) when the individual becomes eligible for Medicare or other group coverage; 2) after nine months of the discount; or 3) when the maximum period of COBRA coverage ends, whichever occurs first.<sup>177</sup>

“In Florida, the average monthly family COBRA premium is \$1037, which is more than the average monthly unemployment benefit of \$1013. For an individual policy in Florida, COBRA is \$371 monthly—more than a third of the unemployment check.”<sup>178</sup>

## 7. HIPAA Issues

In 2009, a nurse was charged with HIPAA violations after she took pictures of a patient with a sex device lodged in his rectum and “posted them on her Facebook page.”<sup>179</sup>

### C. Workers’ Compensation

Penalties against Florida employers who fail to provide workers’ compensation insurance can be severe.<sup>180</sup> “The penalty for not carrying workers’ [compensation] coverage for employees may be \$1000 or a formula based on the premium the employer would have paid, multiplied by 1.5. The penalty can go back three years and may be stiffer for riskier businesses, such as roofing.”<sup>181</sup> To encourage compliance, a new whistle-blower website aims at “mak[ing] it easier for workers to check their companies’ coverage and to complain anonymously if their employer does not carry workers’ [compensation].”<sup>182</sup>

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176. See Marjorie Glover & Edward Smith, *New COBRA Subsidy Requirements Impact Employers, Insurers and Health Plan Participants*, LAW.COM, Apr. 22, 2009, <http://www.law.com/jsp/PubArticle.jsp?id=1202430059402>.

177. *Id.*

178. John Dorschner, *Report: COBRA Cost Is Too Much*, MIAMI HERALD, Jan. 10, 2009, at C3.

179. *Nurses Fired over Cell Phone Photos of Patient*, WISN.COM, Feb. 25, 2009, <http://www.wisn.com/cnn-news/18796315/detail.html>.

180. See Marcia Heroux Pounds, *Firms Without Coverage Nabbed*, MIAMI HERALD, Aug. 14, 2009, at C1.

181. *Id.*

182. *Id.*

In 2008, in *Murray v. Mariner Health*,<sup>183</sup> the Supreme Court of Florida ruled “that an attorney representing injured employees” in workers’ compensation cases “should collect ‘reasonable fees.’”<sup>184</sup> Critics of the decision feared it would result in a “return to an hourly fee structure for attorneys in workers’ comp cases, eliminating the schedule set up by the 2003 law” responsible for workers’ comp rates falling sixty percent.<sup>185</sup> In fact, in 2009, Florida’s insurance commissioner “raise[d] workers’ compensation rates 6.4 percent in response to” the *Murray* ruling.<sup>186</sup>

A year after the Supreme Court of Florida struck down the attorneys’ fee limits law for workers’ compensation, the Florida Legislature passed a new law overruling the high state court and “restor[ing] caps on fees for lawyers who represent workers in compensation appeals for on-the-job injuries.”<sup>187</sup> “[T]rial lawyers and unions say the [new law is] unfair to workers who are hurt and help companies that can spend more on lawyers, raising constitutional problems.”<sup>188</sup> In response to the new law, Florida’s insurance commissioner rescinded the 6.4 percent “workers’ compensation rate increase that went into effect April 1.”<sup>189</sup>

In *Sanders v. City of Orlando*,<sup>190</sup> the Supreme Court of Florida settled a state court split over a 2001 amendment to the state’s workers’ compensation statute dealing with how lump-sum settlements are approved.<sup>191</sup> The Court ruled that the change did not divest judges of compensation claims of their ability to set aside improper settlements.<sup>192</sup>

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183. 994 So. 2d 1051 (Fla. 2008).

184. Beatrice E. Garcia, *Workers’ Comp Rate May Rise Close to 19%*, MIAMI HERALD, Nov. 18, 2008, at C3 [hereinafter Garcia, *Workers’ Comp Rate*]; *Murray*, 994 So. 2d at 1062. The attorney representing “an injured nurse was initially awarded \$685 after 80 hours of work. The court ruling reset his fees to \$16,000.” David Decamp, *Panel OK’s Limits on Attorney Fees*, MIAMI HERALD, Mar. 18, 2009, at B6.

185. Garcia, *Workers’ Comp Rate*, *supra* note 184. “Changes in the law passed in 2003 imposed a strict fee schedule for attorneys.” *Bill on Attorney Fees Heads to the House*, MIAMI HERALD, Mar. 18, 2009, at 3C.

186. *Workers’ Compensation Rates Raised 6.4 %*, MIAMI HERALD, Jan. 27, 2009, at C3. The increase was the first one in over five years. *Workers Compensation Insurance Rates Rise*, MIAMI HERALD, Feb. 11, 2009, at C3.

187. Associated Press, *New Law Caps Lawyers’ Fees for Workers’ Comp*, MIAMI HERALD, May 30, 2009, at B3.

188. Decamp, *supra* note 184.

189. Bill Kaczor, *Workers’ Comp Hike Rolled Back*, MIAMI HERALD, June 4, 2009, at C1.

190. 997 So. 2d 1089 (Fla. 2008).

191. *See id.* at 1094.

192. *See id.* at 1095.

Under Florida's Heart-and-Lung Act, hypertension "applies only to arterial or cardiovascular hypertension."<sup>193</sup> Florida's workers' compensation statute creates a presumption that hypertension leading to disability of firefighters, law enforcement officers, or correctional officers are compensable.<sup>194</sup> Invoking this presumption, a 50-year-old retired Miami police officer's health insurance carrier denied his hundreds of thousands of dollars in medical claims, "saying it is the responsibility of workers' compensation because he had a preexisting condition at the time of his first heart attack in 2007."<sup>195</sup>

In *Bifulco v. Patient Business & Financial Services, Inc.*,<sup>196</sup> plaintiff brought a retaliation claim for filing a workers' compensation claim against a public entity.<sup>197</sup> Florida courts are split over whether workers' compensation claims against public entities are tortious in nature, which triggers a notification process enabling the public entity to decide whether to waive its sovereign immunity.<sup>198</sup> This court distinguished workers' compensation claims from common law tort claims, thus dispensing of the notification requirement.<sup>199</sup>

*Cabrera v. T.J. Pavement Corp.*<sup>200</sup> interpreted the 2003 change in workers' compensation law regarding when an employee can sue the employer in tort and is not bound by the exclusivity of workers' compensation.<sup>201</sup> The 2003 law made it harder for employees to sue their employers in tort by changing the substantially certain "standard with the virtually certain standard."<sup>202</sup>

In *Houck v. Lee County Board of County Commissioners*,<sup>203</sup> under the workers' compensation law in effect at the time of the plaintiff's accident, an injured worker need only establish that his injuries were "catastrophic" to prove a claim for permanent total disability.<sup>204</sup> To rebut, the employer must offer conclusive evidence that the worker had "a substantial earning capaci-

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193. *Bivens v. City of Lakeland*, 993 So. 2d 1100, 1102 (Fla. 1st Dist. Ct. App. 2008).

194. FLA. STAT. § 112.18(1) (2009); see *Bivens*, 993 So. 2d at 1102.

195. Jennifer Lebovich, *Ill Ex-Officer's Bills in Limbo*, MIAMI HERALD, Apr. 20, 2009, at B4.

196. 997 So. 2d 1257 (Fla. 5th Dist. Ct. App. 2009).

197. *Id.* at 1257.

198. See *id.* at 1257–58.

199. *Id.* at 1258.

200. 2 So. 3d 996 (Fla. 3d Dist. Ct. App. 2008).

201. *Id.* at 998–99.

202. *Id.* at 999 n.4.

203. 995 So. 2d 1102 (Fla. 1st Dist. Ct. App. 2008).

204. *Id.* at 1104.

ty.”<sup>205</sup> The case was remanded for an analysis of this allocation of burdens of proof.<sup>206</sup>

#### D. *Unemployment Issues*

“[T]his recession has been the most punishing job destroyer in at least 60 years, slashing a net total of 6.7 million jobs. All told, 14.5 million people were out of work [in July 2009], with a jobless rate of 9.4 percent.”<sup>207</sup> In South Florida, the unemployment rate for Miami-Dade in June 2009 was 10.6 percent “and 9.4 percent for Broward.”<sup>208</sup> Florida “ranked second in the United States for job losses in 2008 . . . Florida lost 255,200 jobs last year, more than any other state except California.”<sup>209</sup> “State forecasters also are predicting an unemployment rate near 11 percent—with close to 1 million out-of-work Floridians—through the end of 2011.”<sup>210</sup>

In 2009, nine million Americans received unemployment compensation, with payments averaging around \$300 per week,<sup>211</sup> varying by state and work history.<sup>212</sup> Laid-off workers in half the states are eligible for up to seventy-nine weeks of benefits, the longest period ever.<sup>213</sup> As a result, unemployment

205. *Id.*

206. *Id.*

207. Leonard, *Any Job at All*, *supra* note 101. “All told, nearly 25 million Americans were either unemployed, underemployed, or had given up looking for a job in April [2009].” Frank Bass, *Even Part-Time Workers Losing Jobs*, MIAMI HERALD, June 6, 2009, at C4. “U.S. births fell in 2008, the first full year of the recession, marking the first annual decline in births since the start of the decade and ending an American baby boomlet.” Mike Stobbe, *Births Fell 2 Percent as Recession Began*, MIAMI HERALD, Aug. 8, 2009, at A7.

208. Editorial, *Tough Choices Ahead for South Florida*, MIAMI HERALD, July 20, 2009, at A16. Miami-Dade’s unemployment rate is “the worst jobless rate since September 1983, when it was 10.8 percent.” Scott Andron, *1 in 9 Out of Work in County*, MIAMI HERALD, July 18, 2009, at A1. In January 1983, Miami-Dade’s jobless rate was 13.7 percent. *See id.*

209. Scott Andron, *State Economy Not Quite Worst*, MIAMI HERALD, Jan. 28, 2009, at C1.

210. Scott Andron & Marc Caputo, *Later Florida Recovery Seen*, MIAMI HERALD, July 22, 2009, at C1.

211. Erik Eckholm, *Prolonged Aid to Unemployed Is Running Out*, N.Y. TIMES, Aug. 2, 2009, at A1. In Florida, the maximum weekly unemployment check is \$275. *See* Michael Luo, *Extended Benefits Are a Lifeline for Many Unemployed*, N.Y. TIMES, Dec. 21, 2008, at A30 [hereinafter Luo, *Extended Benefits*].

212. Eckholm, *supra* note 211. In Florida,

[y]ou must have worked in the state for a minimum period of time, earned a certain amount of money and have been dismissed from your last job for reasons other than “misconduct.” In this context, misconduct means a willful disregard of the employer’s interests; poor job performance is not necessarily misconduct.

Scott Andron, *Some Tips on Filing Jobless Claims*, MIAMI HERALD, Aug. 2, 2009, at E1.

213. Eckholm, *supra* note 211. “[U]nemployment benefits are exempt from Social Security and Medicare taxes.” Richard Perez-Pena, *As It Cuts Jobs, Gannett Also Cuts Severance*

funds are being exhausted.<sup>214</sup> States are borrowing billions of dollars to pay idled workers who wait far longer for benefits to begin.<sup>215</sup>

In 2008, the Department of Labor's Employment and Training Administration issued a final rule barring unemployment compensation claimants with multistate wages from forum shopping.<sup>216</sup> While Florida accepted nearly two billion dollars in federal stimulus money in 2009 to extend the duration of jobless benefits by up to twenty weeks and to pay an extra \$25 per week, the state rejected \$444 million which would have extended benefits to some part-time employees and to those who quit out of necessity.<sup>217</sup>

In Florida,

only 32 percent of jobless state residents are able to access unemployment benefits. Many of the remaining workers fall through the cracks because of outdated eligibility rules that do not count their most recent work. . . . The result often prevents low-wage workers and those in high-turnover fields from getting unemployment compensation . . . .<sup>218</sup>

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Pay, N.Y. TIMES, July 27, 2009, at B5. But "[m]any jobless Americans find their problems aggravated by bank fees on their unemployment benefits." Christopher Leonard, *Bank Fees Compound Problems of Jobless*, MIAMI HERALD, Feb. 20, 2009, at C1. "Through the first quarter of 2009, employment for 16- to 24-year-olds dropped by 5 percent, the largest decline for any age cohort. . . . This produced the lowest employment rates for young people in almost 40 years." Morley Winograd & Michael D. Hais, *Young Adults Remain Optimistic*, MIAMI HERALD, June 25, 2009, at A15. "For instance, the government does not consider so-called 'discouraged' workers, who have given up looking for a job, as part of the labor force. And part-time workers who want full-time jobs, but can't find them, are considered employed." Scott Andron & Joel Poelhuis, *Where's the Work?*, MIAMI HERALD, June 20, 2009, at A1. "Currently, people can draw benefits for up to 79 weeks in 24 states and from 46 weeks to 72 weeks in others." Eckholm, *supra* note 211.

214. Eckholm, *supra* note 211.

215. Lawrence Downes, *Scrambled States of America*, N.Y. TIMES, July 27, 2009, at A20. Some banks are "lower[ing] mortgage payments for some homeowners to an average of \$500 a month for three months as part of a new program to help the unemployed." *Citigroup to Aid Jobless on Loans*, SUN-SENTINEL, Mar. 4, 2009, at D3.

216. Employment and Training Administration, 73 Fed. Reg. 63,068, 63,069 (Oct. 23, 2008) (to be codified at 20 C.F.R. pt. 616).

217. Alex Leary, *State Rejects Some Jobless Funds*, MIAMI HERALD, Apr. 30, 2009, at B6. Federal stimulus money would also mean that "the nearly 10 percent of Floridians receiving food stamps should get \$27 more a month." Marc Caputo, *\$13.5 Billion Stimulus Could Boost Food Stamps, Jobless Aid*, MIAMI HERALD, Mar. 5, 2009, at B6. "Florida added 50 staff members to its unemployment insurance division in [2008], bringing its total to around 870. It also recently added 345 lines to its phone system for a total of just over 1,000, and has extended its call-in hours." Luo, *Extended Benefits*, *supra* note 211.

218. Arthur J. Rosenberg, *Too Few Eligible for Assistance*, MIAMI HERALD, Apr. 6, 2009, at A15. "Two bills before the Florida Legislature, SB 516 and H 1333, would modernize this



In 2009, a new law amended Florida's unemployment compensation law governing the "calculation of employers' tax rates and the Unemployment Compensation Trust Fund[s] solvency."<sup>219</sup> The new law lowers that part of an employee's wage that is not subject to the unemployment tax until 2015.<sup>220</sup> Afterwards, taxable wages revert to \$7000.<sup>221</sup> In sum, for five years, "employers will be taxed on an additional \$1,500" of income to restore solvency to Florida's Unemployment Compensation Trust Fund.<sup>222</sup> Moreover, the new law raises "the positive fund balance adjustment factor from 3.7 percent of taxable payrolls to 4 percent."<sup>223</sup>

"Unemployment among black Floridians could reach almost 17 percent" by Spring 2010, up from 14.6 percent in 2009, while the overall jobless rate is estimated to be 11.8 percent in Spring 2010.<sup>224</sup> "Much of the disparity is due to a concentration of blacks and Hispanics in construction, blue-collar or service-industry jobs that have been decimated by the economic melt-down."<sup>225</sup>

"If the recession continues, women are poised to surpass men on the nation's payrolls . . . because most large-scale layoffs have been in male-dominated industries."<sup>226</sup>

[A] full 82 percent of the job losses have befallen men, who are heavily represented in distressed industries like manufacturing and construction. Women tend to be employed in areas like education and health care, which are less sensitive to economic ups and downs, and in jobs that allow more time for child care and other domestic work.<sup>227</sup>

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system. They would give part-time workers, victims of domestic violence and low-wage earners a lifeline . . . ." *Id.*

219. Fla. Senate Comm. on Commerce, SB 810 (2009): Summary of Legislation Passed 43 (June 16, 2009), available at <http://www.flsenate.gov/data/Publications/2009/Senate/reports/summaries/pdf/sessionsummary09.pdf>.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Scott Andron, *Black Joblessness Could Leap*, MIAMI HERALD, July 28, 2009, at C3.

225. Jesse Washington, *Firing Habits Favor Whites—Traditional Layoff Formula Increases Minority Job Loss*, SUN-SENTINEL, Mar. 24, 2009, at D3.

226. Goodman, *Fewer Women Winning Jobs in Executive Suites*, *supra* note 134.

227. Catherine Rampell, *U.S. Women Set to Surpass Men in Labor Force*, N.Y. TIMES, Feb. 6, 2009, at A1. "The unemployment rate for males in April 2009 was 10 percent, versus only 7.2 percent for women, the largest absolute and relative gender gap in unemployment rates in the post-World War II period." Bob Herbert, *No Recovery in Sight*, N.Y. TIMES, June 27, 2009, at A17.

“Workers ages 45 and over form a disproportionate share of the hard-luck recession category, the long-term unemployed—those who have been out of work for six months or longer . . . .”<sup>228</sup>

## E. Public Pensions

### 1. Federal Regulation

In 2009, the Securities and Exchange Commission proposed new rules to end the practice known as “pay to play,” an unspoken arrangement whereby public pension fund “investors are chosen [by fund managers] not for their low fees and high skills but for their connections.”<sup>229</sup>

Nationally, “[s]tate pension funds lost \$865.2 billion in 2007–2008. . . . And assets for 109 state funds declined about 30 percent” in that period.<sup>230</sup>

### 2. Florida’s Public Pension Fund

Amid the economic recession of 2008–09, Florida’s public employee pension plan “lost \$37.9 billion—27 percent—over 13 months.”<sup>231</sup> While Florida’s retirement fund enjoyed “an \$8.2 billion surplus” in 2008, it sustained “an \$8.7 billion deficit” in 2009.<sup>232</sup> Despite these losses, “[t]he director of the Florida’s \$90 billion state retirement fund says the pension account is in good shape.”<sup>233</sup>

Florida’s State Board of Administration (SBA) “manages more than \$122.6 billion of the state’s investments,” including billions of dollars in Florida employees’ pension funds.<sup>234</sup> A bill is likely to be introduced in the 2009 “legislative session that would expand the SBA’s investment advisory committee to include qualified representatives from the pension plans.”<sup>235</sup>

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228. Michael Luo, *Longer Periods of Unemployment for Workers 45 and Older*, N.Y. TIMES, Apr. 13, 2009, at A11 [hereinafter Luo, *Longer Periods*].

229. Editorial, *A \$2.2 Trillion Temptation*, N.Y. TIMES, July 28, 2009, at A24.

230. Donya Currie, *State Pensions Go Downhill*, AARP BULLETIN, Mar. 2009, at 6. “Pension costs were blamed for bankrupting Vallejo and pushing other California cities to the brink.” Fred Grimm, *Warnings Not Heeded About Pension Burden*, MIAMI HERALD, June 14, 2009, at B1.

231. Bill Kaczor, *State Pension Fund Takes Hit, but Still Above Water*, MIAMI HERALD, Nov. 18, 2008, at C1.

232. Grimm, *supra* note 230.

233. *Pension Boss Says Florida’s Fund Is Stable*, MIAMI HERALD, Mar. 25, 2009, at C3. “The fund has 93 percent of what it needs to cover everyone entitled to a pension.” *State Fund Suffers Loss*, MIAMI HERALD, Aug. 6, 2009, at C1.

234. Beatrice Garcia, *Full Disclosure*, MIAMI HERALD, Jan. 19, 2009, at 16.

235. *Id.*

The SBA's new executive director said, "Florida will still have a conservative and diversified investment strategy with a focus on the long term."<sup>236</sup> "In 2007, the state Legislature passed a bill that required the pension plans to divest any stock issued by any company or its subsidiaries that did business with Iran or Sudan."<sup>237</sup>

In June 2009, Governor Crist "signed into law new rules that will limit state employees' ability to collect a paycheck and a pension from the same agency."<sup>238</sup>

The amount of overtime put in by police officers and firefighters has a dramatic effect on their public pensions which are based on an employee's five highest-paid years.<sup>239</sup> Some "deputies and fire rescue workers bumped up those averages considerably, some nearly doubling base salaries with [overtime]."<sup>240</sup>

Under Florida law, public officials who commit certain crimes stand to forfeit their public pensions.<sup>241</sup> The former Broward sheriff lost his \$130,000-a-year pension after "admitting he took tens of thousands of dollars from BSO vendors and lied on his income-tax returns."<sup>242</sup> An administrative law judge ruled in 2009 that the crimes the disgraced former sheriff pleaded guilty to constituted a felony under Florida law.<sup>243</sup>

## F. Safety Issues

### 1. Federal Activity

In 2009, reversing a Bush administration policy, President Obama instructed executive departments and agencies that state law should be preempted sparingly.<sup>244</sup> "Throughout our history, [s]tate and local govern-

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236. Bill Kaczor, *Pension Chief's Approach Conservative, Diversified*, SUN-SENTINEL, Nov. 28, 2008, at B10.

237. Beatrice E. Garcia, *Florida Retirement System Often Votes Its Shares for Change*, MIAMI HERALD, Jan. 19, 2009, at 19.

238. *Crist Signs Law Restricting Double-Dipping*, *supra* note 53. In 2009, some school districts began to "no longer allow[] teachers to work [beyond] their planned early retirement—unless they agree to work in a disadvantaged school." Patricia Mazzei, *Teacher Rehiring Considered*, MIAMI HERALD, Apr. 17, 2009, at B3.

239. Grimm, *supra* note 230.

240. *Id.*

241. See Dan Christensen, *Jenne's Pension Hopes Dim*, MIAMI HERALD, Mar. 4, 2009, at B1.

242. *Id.*

243. *Id.*

244. Memorandum from President Barak Obama to the Heads of Exec Dept's & Agencies, 74 Fed. Reg. 24,693, 24,693 (May 20, 2009).

ments have frequently protected health, safety, and the environment more aggressively than has the national Government.”<sup>245</sup>

In 2008, the Department of Transportation’s Federal Motor Carrier Safety Administration issued interim regulations permitting commercial motor vehicle drivers “to drive up to 11 hours” within a single workday.<sup>246</sup>

## 2. Florida Safety Issues

In 2008, “Gov[ernor] Charlie Crist signed [the] so-called guns-at-work legislation . . . allowing employees with concealed-weapons permits to begin stashing their firearms in their locked cars at work starting July 1.”<sup>247</sup> In the first case to assess the validity of the new law, a federal district court ruled that the Florida statute forcing employers to allow employees with permits to carry concealed weapons to keep guns secured in their vehicles in the employer’s parking lot is, for the most part, likely valid.<sup>248</sup> Other lawsuits alleging violations of the new concealed-arms law include a security guard who sued Walt Disney World “after he was terminated for having a weapon in his car at work.”<sup>249</sup> The first South Florida case involves a funeral home employee who claims his firing violated the new state law.<sup>250</sup>

“Five employees at Broward County’s main courthouse have filed lawsuits saying mold at the building made them sick.”<sup>251</sup>

The Palm Beach County Public School Board “is considering amending the requirements of a new anti-bullying policy, mandated by state law, to specifically prohibit harassing students [or staff members] who believe they

245. *Id.* The White House memorandum was published in the May 22, 2009 issue of the Federal Register, 74 Fed. Reg. 24,693. *Id.*

246. Hours of Service of Drivers, 73 Fed. Reg. 69,567, 69,567 (Nov. 19, 2008) (to be codified at 49 C.F.R. pts. 385, 395). The final rule was published in the November 19, 2008 issue of the Federal Register, 73 Fed. Reg. 69,567. *Id.*

247. Monica Hatcher, *Governor Signs Gun Law*, MIAMI HERALD, Apr. 16, 2008, at C2.

248. Fla. Retail Fed’n Inc. v. Att’y Gen. of Fla., 576 F. Supp. 2d 1281, 1289–91 (N.D. Fla. 2008). In 2007, a federal judge found the Oklahoma concealed-arms law was preempted by the “[F]ederal Occupational Safety and Health Act, which requires employers to maintain a safe work environment.” Patrick Danner, *Fired Worker’s Suit Tests New Concealed-Arms Law*, MIAMI HERALD, Jan. 29, 2009, at C1.

249. Danner, *Fired Worker’s Suit*, *supra* note 248.

250. *Id.* In 2008, Disney World agreed “to restrict its employee gun ban to company property only. Employees who work outside the Walt Disney World Resort area will be allowed to keep guns locked in their cars if they have a concealed-weapons permit, keep the guns hidden, and leave them in their cars.” G. Thomas Harper, *Disney Relaxes Hard-Line Stance Against Guns at Work, Tweaks Policy*, FLA. EMP. L. LETTER, Oct. 2008, at 6.

251. Diana Moskovitz, *Court Staff: Building Mold Made Us Sick*, MIAMI HERALD, Apr. 1, 2009, at B1.

were born the wrong sex and those who may be perceived as being too masculine or too feminine for their gender.”<sup>252</sup>

#### G. *Internet, E-mail, and Cell Phone Issues*

Many employers are still struggling to shape their online policies.<sup>253</sup> While both wide-open Internet access and fully closed approaches are untenable, employers should conduct employee training on topics such as “online liability and confidentiality.”<sup>254</sup> One option is for employers to grant employees online access to some sites, but limit what they can do there.<sup>255</sup>

“A national safety group is advocating a total ban on cell-phone use while driving” and says “businesses should prohibit employees from using cell phones while driving on the job.”<sup>256</sup>

#### H. *Public Union Issues*

In 2008, “[u]nion membership in the United States rose . . . by the largest amount in a quarter-century, a gain of 428,000 members . . . [and] most of the new members were government employees.”<sup>257</sup> In 2008, “36.8 percent of government employees belong to unions, compared with just 7.6 percent of workers in the private sector.”<sup>258</sup> In 2008, “[t]he number of unionized government workers grew by 275,000 . . . and the number of unionized private sector workers grew by slightly more than 150,000.”<sup>259</sup>

In 2009, in *Locke v. Karass*,<sup>260</sup> a unanimous United States Supreme Court ruled that a local union can charge a service fee to objecting non-members for a share of the national union’s litigation expenses without violating the First Amendment.<sup>261</sup> Those costs, the Court made clear, are properly related to collective bargaining.<sup>262</sup> Also in 2009, in *Ysursa v. Pocatello Education Ass’n*,<sup>263</sup> the United States Supreme Court ruled that an Idaho law

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252. Laura Green, *School District Explores New Protection for Gay Students*, MIAMI HERALD, Nov. 6, 2008, at C1.

253. See Martha Irvine, *Opening Up the Internet*, MIAMI HERALD, July 18, 2009, at C3.

254. *Id.*

255. *Id.*

256. Joan Lowy, *Group to Drivers: Hang up Phone*, CHI. TRIB., Jan. 12, 2009, at 6.

257. Steven Greenhouse, *Union Growth in 2008 Was Largest in 25 Years*, N.Y. TIMES, Jan. 29, 2009, at A18.

258. *Id.*

259. *Id.*

260. 129 S. Ct. 798 (2009).

261. *Id.* at 806–07.

262. *Id.* at 807.

263. 129 S. Ct. 1093 (2009).

banning local government employers from allowing payroll deductions for political activities does not violate the public unions' First Amendment free speech rights.<sup>264</sup>

In 2009, charter schools, "which are publicly financed but managed by groups separate from school districts," have become targets of unionization drives.<sup>265</sup> Some question whether unions will enhance "the charter movement by stabilizing its . . . transient teaching force, or weaken it by" barring employers from dismissing incompetent teachers.<sup>266</sup>

While the Civil Service Reform Act of 1978 granted collective bargaining rights to federal employees, it permits the President to remove some classes of employees from coverage.<sup>267</sup> Exercising this option, in 2008, President Bush, by executive order, ruled out collective bargaining rights for "8600 federal employees who work in law enforcement, intelligence and other agencies" tied to national security.<sup>268</sup>

A federal district court in Florida ruled that a public union did not violate its duty of fair representation by refusing to represent an employee dismissed "for filing a false worker's compensation claim . . . in the grievance process against the County,"<sup>269</sup> concluding that "the Union did not act arbitrarily, discriminatorily, or in bad faith."<sup>270</sup>

### I. *Family Medical Leave Act Issues*

The Defense Department's authorization bill for fiscal year 2008 included provisions amending the Family Medical Leave Act (FMLA) to offer two new leave options—military caregiver leave and qualifying exigency leave.<sup>271</sup> Eligible employees who are family members of soldiers are entitled to take up to six months of leave in a twelve month period to care for a seriously ill or wounded soldier whose injury occurred in the line of duty while on active duty.<sup>272</sup>

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264. *Id.* at 1096.

265. Sam Dillon, *As More Charter Schools Unionize, Educators Debate the Effect*, N.Y. TIMES, July 27, 2009, at A1.

266. *Id.*

267. Robert Pear, *Some Federal Workers Lose Bargaining Rights*, N.Y. TIMES, Dec. 2, 2008, at A20.

268. *Id.*

269. *Wimberly v. Miami-Dade County*, 8 So. 3d 1160, 1161 (Fla. 3d Dist. Ct. App. 2009).

270. *Id.* at 1162.

271. Family Medical Leave Act of 1993, 29 C.F.R. § 825.100(a) (2009).

272. 29 C.F.R. § 825.127(a). New Department of Labor regulations implementing these statutory amendments took effect January 16, 2009. *Id.*

Federal legislation proposed, in 2008, the Federal Employees Paid Parental Leave Act,<sup>273</sup> which would allow federal employees to take four weeks of paid leave after the birth or adoption of a child.<sup>274</sup> The worker would also be entitled to four additional weeks of accrued paid sick leave.<sup>275</sup>

Proposed federal legislation, the Healthy Families Act,<sup>276</sup> among other things, requires employers with fifteen or more employees to provide paid sick leave based on a formula set out in the bill.<sup>277</sup>

In 2009, a Labor Department opinion letter made clear that a 1995 regulation interpreting the phrase notice as soon as is practicable in the FMLA usually meant notification within one or two business days no longer applied.<sup>278</sup> Instead, under the new rule, an employee is not guaranteed an allowance of a specific number of days within which to provide notice of unforeseen FMLA leave.<sup>279</sup>

In *Martin v. Brevard County Public Schools*,<sup>280</sup> the Eleventh Circuit ruled that a public school employee, who was fired for not completing a performance improvement plan while on approved leave, may pursue FMLA interference and retaliation claims against her former employer.<sup>281</sup>

#### IV. DISCIPLINE, RETALIATION, LAYOFFS, FURLOUGHS, AND TENURE ISSUES

##### A. Discipline

##### 1. On-Duty Misconduct

Fort Lauderdale's Office of Professional Standards is conducting an investigation over whether the police department "purportedly rewards officers for making arrests and handing out citations, while penalizing those who don't go along by revoking overtime and voluntary details."<sup>282</sup> "Quotas for

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273. Federal Employees Paid Parental Leave Act of 2008, H.R. 5781, 110th Cong. (2008).

274. *Id.* § 2(a)(3)(A).

275. *Id.* § 2(a)(3)(A)–(B).

276. Healthy Families Act, S. 910, 110th Cong. (2007).

277. *Id.* §§ 4(3)(B)(i)(I), 5(c).

278. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2009-1-A (Jan. 6, 2009), available at [http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009\\_01\\_06\\_1A\\_FMLA.pdf](http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.pdf).

279. *See id.*

280. 543 F.3d 1261 (11th Cir. 2008).

281. *Id.* at 1267–68.

282. Jennifer Mooney Piedra, *Quotas for Arrests Alleged*, MIAMI HERALD, Oct. 27, 2008, at A1.

making arrests and writing tickets are widely criticized in law enforcement circles.”<sup>283</sup>

In 2007, a Florida circuit judge, “a longtime criminal court judge, was transferred to the civil division after making a racially-charged comment about a case involving a black defendant and several black victims and witnesses.”<sup>284</sup>

## 2. Off-Duty Misconduct

“A Weston middle school principal said a sleeping disorder led him to try to strangle his wife.”<sup>285</sup> Even though the principal was charged with battery by strangulation, his public employer said the principal’s “arrest is ‘not what we consider to be a school-related matter. It doesn’t have any impact on the school district or this individual’s ability to function as a school principal.’”<sup>286</sup>

“Sixteen Broward Sheriff’s Office employees, including 15 deputies, have been moved to desk jobs while they are investigated for possible steroid use . . . [t]hat lead to the group’s being told to submit to drug tests.”<sup>287</sup> Subsequently, nine deputies “were cleared after tests showed they were steroid-free.”<sup>288</sup>

### B. *Retaliation and Whistle-Blowing*

In 2009, in *Crawford v. Metropolitan Government*,<sup>289</sup> the Supreme Court ruled that an employee who did not initiate a job discrimination complaint, but spoke up about harassment when questioned during her employ-

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283. Jennifer Mooney Piedra, *System Widely Criticized but Sometimes Used*, MIAMI HERALD, Oct. 27, 2008, at A2.

284. Todd Wright, *Minority Lawyers Eye Judge Vacancies*, MIAMI HERALD, Nov. 20, 2008, at B1.

285. David Smiley, *Principal Cites Sleep Disorder*, MIAMI HERALD, Jan. 8, 2009, at B1.

286. *Id.*

287. Diana Moskovitz, *16 Investigated for Possible Steroid Use*, MIAMI HERALD, Feb. 25, 2009, at B3.

288. Diana Moskovitz, *Nine Cleared in BSO Steroid Case*, MIAMI HERALD, Mar. 18, 2009, at B3. “BSO prohibits the use of steroids unless obtained ‘through a legitimate physician/patient relationship and prescription.’ BSO policy also outlaws the use of masking agents to hide steroid use.” *Id.*

289. 129 S. Ct. 846 (2009). “Lower courts had ruled Crawford was not protected under the federal anti-retaliation law, Title VII of the Civil Rights Act, because she had not ‘instigated or initiated’ the complaint, but merely answered questions in a case already under way.” Robert Barnes, *Court Sides with Employee Who Was Fired*, MIAMI HERALD, Jan. 27, 2009, at A3.



er's internal investigation of sex bias allegations, is protected from retaliation by her employer under Title VII.<sup>290</sup>

Florida's Fourth District Court of Appeal ruled that a "building-inspection supervisor and whistle-blower fired by the Broward School Board should get her job back."<sup>291</sup>

A Miami-Dade prosecutor was suspended after a memo raising doubts about the Miami-Dade State Attorney's independence from the Miami-Dade Police Department was posted on his blog "and linked it to a popular Miami-Dade legal website for the world to see."<sup>292</sup> The veteran prosecutor claims his employer "trampled on his First Amendment free-speech rights by retaliating against him for posting his own memo to the 'Justice Building' blog."<sup>293</sup> The employer, citing *Garcetti v. Ceballos*,<sup>294</sup> asserts that "'state-ments made by public employees pursuant to their official duties are not pro-ected under the First Amendment.'"<sup>295</sup>

The Republican Party of Palm Beach County refused to seat a white sup-remacist, the winner of an "election as a committeeman because he failed to sign a loyalty oath."<sup>296</sup> The Republican Party claims "Mr. Black's associa-tions appear to violate the oath he failed to sign, which requires that candi-dates avoid activities that are 'likely to injure the name of the Republican Party.'"<sup>297</sup>

In *Bruley v. Village Green Management Co.*,<sup>298</sup> the plaintiff alleged wrongful discharge in violation of public policy.<sup>299</sup> The employee invoked the public policy supporting the exercise of his right to bear arms.<sup>300</sup> The court dismissed the plaintiff's claim, given that he was an at-will employee and Florida does not recognize the common law doctrine of wrongful dis-charge in violation of public policy absent a specific statute creating the cause of action.<sup>301</sup>

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290. *Crawford*, 129 S. Ct. at 849.

291. Hannah Sampson, *Court: Give Job Back to Whistle-Blower*, MIAMI HERALD, Jan. 8, 2009, at B3.

292. Jay Weaver, *Free-Speech Suit Rocks State Office*, MIAMI HERALD, Mar. 21, 2009, at A1.

293. *Id.*

294. 547 U.S. 410 (2006).

295. Weaver, *supra* note 292 (citing *Garcetti*, 547 U.S. at 421).

296. Damien Cave, *A Local Election's Results Raise Major Questions on Race*, N.Y. TIMES, Dec. 12, 2008, at A22.

297. *Id.*

298. 592 F. Supp. 2d 1381 (M.D. Fla. 2008).

299. *Id.* at 1384.

300. *Id.* at 1386.

301. *See id.* at 1386–88.

### C. *False Claims Act*

Under the Fraud Enforcement and Recovery Act of 2009 (FERA),<sup>302</sup> the False Claims Act's (FCA) reverse false claim provision was amended to make clear that the knowing retention of an overpayment is a violation of the statute.<sup>303</sup> In addition, FERA expands liability under the FCA to eliminate the requirement that a false claim be presented to a federal official or that it directly involve federal funds.<sup>304</sup>

### D. *Layoffs*

A 2009 study found that most workers laid-off in a recession, "on average, had not returned to their old wage levels, . . . even 15 to 20 years later."<sup>305</sup> Moreover, "earnings were about 15 percent to 20 percent less than they would have been had they not been laid off."<sup>306</sup>

Laid-off "[w]orkers ages 45 and over . . . were out of work 22.2 weeks in 2008, compared with 16.2 weeks for younger workers."<sup>307</sup> Even when finally re-employed, older workers face a "steeper [decline] in earnings than their younger counterparts."<sup>308</sup>

Public employees, however, "have faced fewer layoffs and pay cuts than those in the private sector."<sup>309</sup>

"There is robust social science evidence that there is serious workplace discrimination against mothers, and that in the context of this economic downturn it appears that mothers are encountering lots of what they see as 'mommy RIFs,'"<sup>310</sup> or reductions in force.<sup>311</sup>

"The Broward Teachers Union filed a lawsuit [in July 2009] to stop the school district's plans to hire new teachers until the union can review public

302. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended at 31 U.S.C. §§ 3729-32).

303. *Id.* § 4.

304. *See id.* § 4.

305. Michael Luo, *Years After Layoffs, Many Still Struggle to Match Old Salaries*, N.Y. TIMES, Aug. 4, 2009, at A1.

306. *Id.* A new reinsurance provider, PayCheck Guardian, pays policyholders "\$1,500 a month for six months" if they "lost [their] job through no fault of [their] own." Ron Lieber, *Insure Yourself Against a Job Loss? Good Luck*, N.Y. TIMES, Aug. 8, 2009, at B1.

307. Luo, *Longer Periods*, *supra* note 228.

308. *Id.*

309. Marc Caputo, *State Officials' Pay to Be Cut 2 Percent*, MIAMI HERALD, May 30, 2009, at B1.

310. Jonathan D. Glater, *Job Cuts Cause Boom in Lawsuits*, N.Y. TIMES, Jan. 31, 2009, at B1 (internal quotations omitted).

311. *Id.*

records to make sure Broward is first bringing back as many laid-off teachers as possible.”<sup>312</sup>

### E. *Furloughs*

Furloughs—temporary, usually unpaid, leave—are popular compared to layoffs.<sup>313</sup> While some workers take the time off, others work through furloughs, out of fear of losing their jobs.<sup>314</sup> “[F]urloughs have become increasingly common in the public and private sectors as employers” search for ways to avoid layoffs.<sup>315</sup> During the 2008–09 recession, even if employees “avoid being laid off, many employers have [retrenched] in other ways, reducing employees’ hours, imposing furloughs, and even” reducing salaries.<sup>316</sup> The number of people working part-time has increased sharply during the recession.<sup>317</sup>

Furloughs may be voluntary or involuntary.<sup>318</sup> For example, in Broward County, Florida, the sheriff “asked law enforcement and detention deputies to take voluntary furloughs” in order to avoid layoffs.<sup>319</sup>

As for salaried workers, “[f]urlough rules are clear: [i]f . . . any work [is performed] at all during a week-long furlough—[even] answering an e-mail, . . . [the employee] is owed the entire week’s salary.”<sup>320</sup>

One furloughed-worker even “started a website called furloughhouseswap.com, where [the furloughed] can swap [houses] for a week in another city.”<sup>321</sup>

Seventeen states have adopted “work-sharing,” under which “employers reduce their workers’ weekly hours and pay, often by 20 or 40 percent, and then states make up some of the lost wages, usually half, from their unemployment funds.”<sup>322</sup>

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312. Patricia Mazzei, *Union Sues over Rehiring*, MIAMI HERALD, July 30, 2009, at B1.

313. Susan Saulny & Robbie Brown, *On a Furlough, but Never Leaving the Cubicle*, N.Y. TIMES, June 15, 2009, at A1.

314. *Id.*

315. Amy Sherman, *Wanted: Furlough Volunteers*, MIAMI HERALD, July 14, 2009, at B1.

316. Michael Luo, *Still Working, but Forced to Make Do with Less*, N.Y. TIMES, May 29, 2009, at A1.

317. *Id.*

318. *See Sherman, Wanted: Furlough Volunteers*, *supra* note 315.

319. *Id.*

320. Cindy Krischer Goodman, *The New F-word [Furloughs] Are Forcing Employees to Do the Unthinkable—Shut off from Work Completely*, MIAMI HERALD, Apr. 15, 2009, at C1.

321. *Id.*

322. Steven Greenhouse, *Out of Work, Part Time*, N.Y. TIMES, June 16, 2009, at B1.

Some of the biggest legal challenges faced by employers as a result of furloughs include: 1) its impact on exempt employees, i.e., salaried employees who get paid if they work twenty hours or sixty hours.<sup>323</sup>—if not careful, such employees may become “non-exempt employees” entitled to overtime; 2) whether to “force employees to use accrued vacation [or] make it optional;” 3) its impact on 401(k) plans; and 4) whether WARN Act notification duties are triggered.<sup>324</sup>

#### F. *Tenure*

In 2008, the chancellor of the Washington public schools proposed huge raises, up to “\$40,000, financed by private foundations, for teachers willing to give up tenure.”<sup>325</sup>

In 2009, the Florida Legislature considered a bill, HB 1411, which “would take teachers hired after July 1 five years, instead of three, to reach a less-protective tenure. . . . A tenured teacher would be limited to a five-year contract and could be [dismissed] without cause when it expires . . . [or] at any time if their students underachieve.”<sup>326</sup>

In 2009,

Florida Atlantic University professors . . . filed a formal complaint against the school, claiming the layoffs of tenured faculty members violate their union contract.

. . . .

Under the union contract, less-experienced faculty members must be laid off before tenured professors when they are all in the same program, or “lay off unit.”<sup>327</sup>

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323. Amanda Bronstad, *Mandatory Employee Furloughs Carry a Long List of Legal Concerns for Employers*, NAT'L L.J., Feb. 25, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428552132&slreturn=1&hbxlogin=1>.

324. *Id.*

325. Sam Dillon, *School Chief Takes on Tenure, and Stirs a Fight*, N.Y. TIMES, Nov. 13, 2008, at A1.

326. Associated Press, *Teaching Contracts New Teachers Could Get Less Job Security*, MIAMI HERALD, Apr. 8, 2009, at B8. By contrast, New York law bars “the use of student test scores in teacher tenure decisions.” Sam Dillon, *Administration Takes Aim at State Laws on Teachers*, N.Y. TIMES, July 24, 2009, at A11.

327. Kimberly Miller, *Four FAU Professors Challenging Layoffs*, MIAMI HERALD, June 30, 2009, at B5.

## V. EMPLOYMENT DISCRIMINATION

## A. Generally

In 2008, charges of age discrimination rose by 28.7 percent (24,582 claims); allegations of race discrimination rose by 11 percent; retaliation claims rose 22.6 percent; and sex discrimination claims rose 14 percent.<sup>328</sup>

In 2009, the Supreme Court ruled in *Pearson v. Callahan*<sup>329</sup> that the two-step analysis, required in *Saucier v. Katz*,<sup>330</sup> for assessing whether defendants in a civil rights action are entitled to qualified immunity,<sup>331</sup> is flexible.<sup>332</sup> Courts need not always start by settling whether a constitutional violation occurred, but may begin the inquiry by asking whether the alleged right was clearly established at the time.<sup>333</sup>

Under proposed federal legislation, the Civil Rights Act of 2008, the damage caps under Title VII would be removed.<sup>334</sup>

## B. Affirmative Action

In 2009, in *Ricci v. DeStefano*,<sup>335</sup> the Supreme Court set a new rule of law on when an employer can intentionally discriminate to avoid a lawsuit.<sup>336</sup> Ruling in favor of white firefighters, the Court concluded the city violated Title VII by throwing out the results of tests used for firefighter promotions because minorities did not make the cut.<sup>337</sup> The Court made it clear that the city's fear of a disparate impact lawsuit was an insufficient basis for discarding the test results, thereby relying on race to the detriment of successful test-takers.<sup>338</sup>

"To avoid charges of discrimination, many cities have already been moving away from such tests in favor of other methods of hiring and promot-

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328. Sam Hananel, *Complaints of Job Bias Hit a Record*, MIAMI HERALD, Mar. 12, 2009, at C6.

329. 129 S. Ct. 808 (2009).

330. 533 U.S. 194 (2001).

331. *See id.* at 201.

332. *Pearson*, 129 S. Ct. at 818.

333. *Id.* at 819 (quoting *Motley v. Parks*, 432 F.3d 1072, 1078 (2005)).

334. Phillips, *supra* note 114, at 6.

335. 129 S. Ct. 2658 (2009).

336. *See id.* at 2681.

337. *Id.*

338. *Id.*

ing employees in places like fire and police departments. They say written tests are often not the best way to determine who can perform best.”<sup>339</sup>

In 2009, fifty advocacy groups “asked President Barack Obama to issue an executive order . . . encourag[ing] the hiring and training of minorities, women, and low-income residents to work on federal construction projects, [specifically] those funded by the economic stimulus package.”<sup>340</sup>

“A plan to devote construction contracts from a new ballpark to black-owned businesses fell apart . . . because [the] Miami-Dade County Attorney . . . said the pact would violate court rulings prohibiting governments from awarding contracts based on race.”<sup>341</sup>

### C. Gender, Same-Sex, Transsexuals, and Pregnancy Discrimination

In 2009, in *Fitzgerald v. Barnstable School Committee*,<sup>342</sup> the Supreme Court ruled that Title IX does not preclude filing a gender discrimination suit under the equal protection clause against a school system under the federal civil rights damages statute, 42 U.S.C. § 1983.<sup>343</sup>

In 2009, in *AT&T Corp. v. Hulteen*,<sup>344</sup> the Supreme Court resolved a circuit court split over whether an employer violated the Pregnancy Discrimination Act (PDA) by calculating a woman’s current retirement benefits based on the employer’s pre-PDA practice of denying service credit for pregnancy leave.<sup>345</sup> The Court rejected arguments that the PDA applied retroactively.<sup>346</sup>

A federal district court in Florida ruled that an employer unlawfully fired a worker in retaliation for filing a charge of gender and pregnancy discrimination under the participation clause of the Florida Civil Rights Act.<sup>347</sup>

Florida state courts and federal district courts in Florida are split over whether the Florida Civil Rights Act encompasses pregnancy discrimina-

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339. Steven Greenhouse, *For Employers, Ruling Offers Little Guidance on How to Make Their Hiring Fair*, N.Y. TIMES, June 30, 2009, at A13.

340. Tony Pugh, *Diversity Sought in Stimulus Hiring*, MIAMI HERALD, Apr. 9, 2009, at C3.

341. Jack Dolan & Charles Rabin, *Race-Based Deal Crumbles*, MIAMI HERALD, Mar. 18, 2009, at B5. In 2008, “[i]n Nebraska, a proposed ban on affirmative action passed easily with nearly 58 percent of the vote. But in Colorado, a nearly identical proposal was narrowly rejected, marking the first time a state’s voters chose to retain such preferences.” Dan Frosch, *Vote Results Are Mixed on a Ban on Preference*, N.Y. TIMES, Nov. 9, 2008, at A19.

342. 129 S. Ct. 788 (2009).

343. *Id.* at 797.

344. 129 S. Ct. 1962 (2009).

345. *Id.* at 1973.

346. *Id.* at 1971.

347. See *Carter v. Health Mgmt. Assocs.*, 989 So. 2d 1258, 1266 (Fla. 2d Dist. Ct. App. 2008).

tion.<sup>348</sup> In *Carsillo v. City of Lake Worth*,<sup>349</sup> the state court concluded in the affirmative.<sup>350</sup> By contrast, a federal district court, in *Boone v. Total Renal Laboratories, Inc.*,<sup>351</sup> ruled that the Florida law does not cover pregnancy discrimination.<sup>352</sup>

A federal district court in Florida ruled that “offensive language need not . . . be targeted at the plaintiff in order to support a claim of hostile workplace environment” sexual harassment.<sup>353</sup>

In *Scott v. Publix Supermarkets*,<sup>354</sup> the court found that the plaintiff did not put her employer on notice regarding sexual harassment but allowed the case to go to trial on the issue of whether denial of a transfer request constitutes an adverse employment action.<sup>355</sup>

In 2009, more than one hundred female employees filed a lawsuit against Florida’s Department of Corrections, “alleging they were subject to constant sexual harassment from male inmates.”<sup>356</sup> “The Corrections Department changed its rules . . . [in 2008] to make the intentional exposing of genitals or masturbating by an inmate subject to 60 days in disciplinary confinement and the loss of 90 days of gain time.”<sup>357</sup>

In 2009, “[a] bipartisan group of U.S. representatives . . . introduced legislation that would make it illegal for employers to discriminate on the basis of sexual orientation or gender identity.”<sup>358</sup> At present, discrimination on the basis of sexual orientation or gender identity “is legal in 30 states based on sexual orientation and in 38 states based on gender identity.”<sup>359</sup>

Lake Worth and Palm Beach County added provisions to their anti-discrimination codes that “prevent discrimination based on gender identity,”

348. *Id.* at 1265–66.

349. 995 So. 2d 1118 (Fla. 4th Dist. Ct. App. 2008).

350. *Id.* at 1121.

351. 565 F. Supp. 2d 1323 (M.D. Fla. 2008).

352. *Id.* at 1327. While pregnancy discrimination is actionable under Title VII, in this case plaintiff’s Title VII claim was time-barred. Defendant’s Motion to Dismiss & Alternative Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(6) at 4; *Boone*, 565 F. Supp. 2d at 1323.

353. *Blizzard v. Appliance Direct, Inc.*, 34 Fla. L. Weekly D1604, D1606 (5th Dist. Ct. App. 2009).

354. No. 07-60624-CIV, 2008 WL 2940672 (S.D. Fla. July 28, 2008).

355. *Id.* at \*7, \*9.

356. Alex Leary, *Female Prison Employees Sue Over Inmates’ Sexual Harassment*, MIAMI HERALD, Mar. 20, 2009, at B6.

357. *Id.*

358. Steve Rothaus, *Bill Tackles Discrimination at Work*, MIAMI HERALD, June 25, 2009, at A3.

359. *Id.*

following the firing of the former Largo city manager for undergoing a sex change.<sup>360</sup>

#### D. *Age Discrimination*

In 2009, in *Gross v. FBL Financial Services, Inc.*,<sup>361</sup> the Supreme Court made it substantially harder for employees to win age discrimination claims by ruling that employees bringing disparate treatment claims under the Age Discrimination in Employment Act (ADEA) must prove “that age was the ‘but-for’ cause of the . . . adverse employment action.”<sup>362</sup> The Court made it clear that, unlike Title VII disparate treatment cases where employees need only prove that illegal bias was just a motivating factor,<sup>363</sup> the ADEA bars discrimination “‘because of’” the employee’s age,<sup>364</sup> which means “‘by reason of [or] on account of.’”<sup>365</sup> In essence, the *Price Waterhouse v. Hopkins*<sup>366</sup> burden-shifting framework for mixed-motive cases under Title VII does not apply to ADEA cases.<sup>367</sup>

In 2009, the EEOC issued a technical assistance document aimed at helping employees and employers understand the rules governing waivers of ADEA claims, including a checklist for employees to consult before signing a waiver as well as a sample release for employers.<sup>368</sup>

#### E. *Disability Discrimination*

In 2009, the EEOC approved a rule implementing the 2008 Americans with Disabilities Act Amendments Act,<sup>369</sup> which overturned four United States Supreme Court rulings that Congress concluded had misread the ADA

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360. Willie Howard, *A Transgender Triumph*, MIAMI HERALD, Apr. 9, 2009, at B5.

361. 129 S. Ct. 2343 (2009).

362. *Id.* at 2352.

363. *Id.* at 2349.

364. *Id.* at 2350 (quoting 29 U.S.C. § 623(a)(1) (2006)).

365. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)).

366. 490 U.S. 228 (1989).

367. *Gross*, 129 S. Ct. at 2351–52; *see* *Mora v. Jackson Mem’l Found., Inc.*, 21 Fla. L. Weekly Fed. D407, D411 (S.D. Fla. Sept. 26, 2008) (“Age discrimination claims” under Florida’s Civil Rights Act “are analyzed under the same framework as ADEA claims.”).

368. *See* U.S. Equal Employment Opportunity Commission, *Understanding Waivers of Discrimination Claims in Employment Severance Agreements*, [http://www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html) (last visited Nov. 7, 2009).

369. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 1, 122 Stat. 3553, 3553 (2008) (codified in scattered sections of 29 and 42 U.S.C.).



and unduly restricted the statute's coverage.<sup>370</sup> Among other things, the new rule "identifies impairments that 'will obviously be "substantially limiting,"' including cancer, diabetes, HIV/AIDS, major depression, post-traumatic stress disorder, and schizophrenia."<sup>371</sup>

In 2009, the EEOC issued guidelines on how employers should handle a possible swine flu pandemic without violating the ADA.<sup>372</sup> Under the guidelines, an employer may require new hires to submit to a medical exam to determine exposure to the flu virus after extending a conditional job offer, but before the new hire begins work, so long as all new employees in the same job class face the same examination.<sup>373</sup> Employees may also be required to wear personal protective gear, subject to the right of reasonable accommodations.<sup>374</sup>

The Second, Seventh, Tenth, and Eleventh Circuits have ruled that driving is not a major life activity under the ADA.<sup>375</sup> In 2009, the Eleventh Circuit ruled that the U.S. Marshals Service's (USMS) ban on the use of hearing aids by court security officers during mandatory hearing tests did not violate the ADA because the USMS established that the ban was both job-related and a business necessity.<sup>376</sup>

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370. See ADA Amendments Act of 2008 §§ 3–4. The 2008 ADA Amendments Act rejected the United States Supreme Court's interpretation of "disability" in the ADA in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing v. Williams*. See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 187, 195–98 (2002); *Sutton v. United Airlines*, 527 U.S. 471, 481–82 (1999).

371. *EEOC Clears Notice of Proposed Rule Interpreting the ADA Amendments Act*, 77 U.S.L.W. 2780, 2781 (June 23, 2009) (quoting Christopher Kuczynski, EEOC assistant legal counsel and director of EEOC's Office of Legal Counsel's ADA policy division).

372. U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html) (last visited Nov. 7, 2009) [hereinafter *Pandemic Preparedness*].

373. *Id.*

374. *Id.*

375. *E.g.*, *Winsley v. Cook County*, 563 F.3d 598, 603 (7th Cir. 2009) (nurse with excessive absenteeism after being diagnosed with a stress disorder following a car accident that made her anxious about driving had no ADA claim) (citing *Kellog v. Energy Safety Serv. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329–30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998)).

376. *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312, 1317 (11th Cir. 2009). Plaintiff's proposed reasonable accommodation, removing the ban, was not reasonable given public safety concerns. *Id.* at 1318.

## F. *Genetic Discrimination*

In 2008, the Genetic Information Non-Discrimination Act (GINA)<sup>377</sup> was signed into law, prohibiting employment discrimination based on the genetic information of an individual and his or her family members.<sup>378</sup> GINA prohibits employers from obtaining or disclosing such information.<sup>379</sup> The Act's coverage, enforcement, and remedial provisions mirror those under Title VII and the Americans with Disabilities Act, as amended by the 1991 Civil Rights Act.<sup>380</sup> GINA took effect on Nov. 21, 2009.<sup>381</sup> Unlike Title VII, however, GINA expressly rules out disparate impact claims.<sup>382</sup>

In 2009, the EEOC published a proposed rule that incorporates references to GINA into some of the EEOC's existing regulations that cover procedures under Title VII and the ADA.<sup>383</sup>

## G. *Religion*

A "midnight" regulation issued by the Department of Health and Human Services in December 2008, aimed at barring bias against providers who prefer not to supply emergency contraceptives and other reproduction services to women, was challenged as unconstitutional.<sup>384</sup>

In 2009, the Department of Health and Human Services published a proposal to rescind a regulation barring employment discrimination against health care workers who refuse to provide abortion-related services owing to religious objections.<sup>385</sup>

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377. Genetic Information Non-Discrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (to be codified at 42 U.S.C. §§ 2000ff–2000ff11).

378. *Id.* § 203(a).

379. *Id.* § 203(b).

380. *See id.* § 20711.

381. *See id.* § 213.

382. Genetic Information Non-Discrimination Act of 2008 § 208(a).

383. *See* Amendment of Procedural and Administrative Regulations to Include the Genetic Information Nondiscrimination Act of 2008 (GINA), 74 Fed. Reg. 23,674, 23,674 (May 20, 2009) (to be codified at 29 C.F.R. pts. 1601, 1602, 1603, 1607, 1610, 1611, 1614, 1625, 1690).

384. Complaint for Declaratory & Injunctive Relief at 4–5, *Connecticut v. United States*, No. 09-CV-54 (D. Conn. Jan. 16, 2009).

385. Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal, 74 Fed. Reg. 10207, 10208–09 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88).

In *Equal Employment Opportunity Commission v. Papin Enterprises, Inc.*,<sup>386</sup> the court rejected the employer's claim that it need not reasonably accommodate an employee's religiously-based right to wear a nose ring on food safety grounds.<sup>387</sup>

## H. Remedies

In 2009, in *14 Penn Plaza, L.L.C. v. Pyett*,<sup>388</sup> the Supreme Court ruled "that a collective-bargaining agreement that clearly and unmistakably requires" employees to arbitrate claims under the ADEA is enforceable.<sup>389</sup>

Under proposed federal legislation, the Civil Rights Act of 2008, the Federal Arbitration Act would be amended to bar "clauses requiring arbitration of federal constitutional or statutory claims (unless an employee knowingly and voluntarily consents to this clause after a dispute has arisen), as part of a [collective bargaining agreement], or after a dispute has arisen."<sup>390</sup> Under proposed federal legislation, the Arbitration Fairness Act of 2009, the Federal Arbitration Act would be amended "to invalidate all predispute arbitration agreements that require the arbitration of employment disputes or any conflict arising under any statute intended to protect civil rights."<sup>391</sup>

In *Board of Trustees of Florida State University v. Esposito*,<sup>392</sup> a Florida court concluded that the Florida Civil Rights Act limits damage awards against the state to \$100,000,<sup>393</sup> but the twenty-five percent attorney's fee limitation does not apply to claims against the state.<sup>394</sup>

## VI. CONCLUSION

This survey dipped into a wide array of public employment issues emerging in 2008–09. Every stage of employment, from hiring, to the terms of employment, to discipline and retaliation against whistle-blowers, to employment discrimination, has witnessed a flurry of activity at the federal,

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386. *Equal Employment Opportunity Comm'n v. Papin Enters., Inc.*, No. 6:07-cv-1548-Orl-28GJK (M.D. Fla. July 28, 2009) (order denying injunctive relief and punitive damage).

387. *See id.* at 2, 8.

388. 129 S. Ct. 1456 (2009).

389. *Id.* at 1474.

390. Phillips, *supra* note 114, at 6.

391. *Supreme Court Affirms Arbitration for Union Member Discrimination Claims*, FLA. EMP. L. LETTER, May 2009, at 3.

392. 991 So. 2d 924 (Fla. 1st Dist. Ct. App. 2008).

393. *Id.* at 927–28 (citing *Gallagher v. Manatee County*, 927 So. 2d 914, 917 (Fla. 2d Dist. Ct. App. 2006)).

394. *Id.* at 927.

state, and local levels. As evidenced by the countless citations to new articles, public sector employment issues draw high-profile media attention, and news stories (whether found in newspapers or on the Internet) provide a wealth of insight and supplement the usual source of legal precedent: constitutional, statutory, regulatory, administrative, and the common law.

## 2009 SURVEY OF JUVENILE LAW

MICHAEL J. DALE\*

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### I. INTRODUCTION

For the past two years the Supreme Court of Florida has not been active in the juvenile law area. During the past survey year, it has only decided one case directly related to juvenile law.<sup>1</sup> On the other hand, the intermediate appellate courts remained active as they have for the past decade. As they usually do, the courts of appeal provide statutory interpretation of chapters 39 and 985 as well as oversee trial court evidentiary rulings in dependency, termination of parental rights, and delinquency cases.

### II. DEPENDENCY

Under Florida law in a dependency proceeding, a party is defined as “the parent or parents of the child, the petitioner, the [Department of Children and Families], the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child.”<sup>2</sup> Grandparents are not included in the statutory definition.<sup>3</sup> Thus, where a father petitioned the appellate court for writ of certiorari to review a trial court order granting a motion to intervene by a grandparent, the appellate court held, in *J.P. v. Department of Children & Family Services*,<sup>4</sup> that the grandmother was not included within the statutory definition of a party.<sup>5</sup>

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1. See generally *E.A.R. v. State*, 4 So. 3d 614 (Fla. 2009).

2. FLA. STAT. § 39.01(51) (2009); FLA. R. JUV. P. 8.210(a).

3. See FLA. STAT. § 39.01(51).

4. 12 So. 3d 253 (Fla. 2d Dist. Ct. App. 2009).

5. *Id.* at 254–55.

Therefore, she could not intervene.<sup>6</sup> However, Florida law does allow a grandparent to intervene as a “participant.”<sup>7</sup>

There are often situations where one parent is charged with dependency and the other parent is viewed as non-offending. The issue of how the trial court goes about evaluating the transfer of custody to the non-offending parent was before the court in *T.S. v. Department of Children & Families*.<sup>8</sup> The non-offending parent challenged the court order denying the Department of Children and Families’ motion to grant temporary custody to that parent.<sup>9</sup> The court did so on the basis of the best interests of the child standard.<sup>10</sup> The appellate court reversed, finding that under the *Florida Statutes*, the court is required “to place a child who is adjudicated to be dependent, as to one parent, with the non-residential parent upon request unless the court ‘finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.’”<sup>11</sup> There having been no such showing, the parent’s appeal, viewed as a writ by the appellate court, was granted.<sup>12</sup>

Once children have been adjudicated dependent, and the parent is provided with a case plan and has substantially complied with it, “there is a presumption that the children should be returned unless it is [determined] that returning the children would endanger them.”<sup>13</sup> The trial court’s obligation to make detailed findings regarding the relevant statutory standard for reunification was before the appellate court in *L.J.S. v. Department of Children & Families*.<sup>14</sup> Florida law provides that in order to deny the motion for reunification, the court must find that if there was compliance with the case plan, reunification would be detrimental to the children, by addressing six subfactors found in the law.<sup>15</sup> The statute is mandatory in that the court cannot deviate from the statutory requirement and must make detailed factual findings regarding the factors.<sup>16</sup> In *L.J.S.*, the court had failed to make detailed factual

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6. *Id.* at 255.

7. *See* FLA. STAT. § 39.01(50) (2009); FLA. R. JUV. P. 8.210(b).

8. 992 So. 2d 299, 299 (Fla. 5th Dist. Ct. App. 2008).

9. *Id.*

10. *Id.*

11. *Id.* at 300 (citing *M.M. v. Dep’t of Children & Families*, 777 So. 2d 1209, 1212 (Fla. 5th Dist. Ct. App. 2001); FLA. STAT. § 39.521(3)(b) (2009)).

12. *T.S.*, 992 So. 2d at 300. As the court in *T.S.* noted, appellate challenges to non-final trial court orders in Florida are often taken by writ of certiorari. *See id.*

13. *L.J.S. v. Dep’t of Children & Families*, 995 So. 2d 1151, 1153 (Fla. 1st Dist. Ct. App. 2008) (per curiam); *see* FLA. STAT. § 39.806(1)(e)(1).

14. *L.J.S.*, 995 So. 2d at 1152–53.

15. *See* FLA. STAT. §§ 39.522(2), .621(10)(a)–(f).

16. FLA. STAT. § 39.522(2); *L.J.S.*, 995 So. 2d at 1153.

finding regarding five of the six factors.<sup>17</sup> The appellate court thus reversed.<sup>18</sup>

Under Florida law, a court need only make one order of dependency to maintain jurisdiction over a dependency case as the order establishes a legal status of the child for proceedings under the chapter.<sup>19</sup> However, the court shall order evidentiary hearings to determine whether there is a separate state of events which also constitutes neglect.<sup>20</sup> In *P.S. v. Department of Children & Families*,<sup>21</sup> the appellate court held that it was improper for the trial court to enter a second order of adjudication of dependency as it maintained jurisdiction over the dependency case once the initial order adjudicating the child was entered.<sup>22</sup> Thus, it remanded for entry of a supplemental adjudicatory hearing finding and reversed the second order of dependency.<sup>23</sup>

As an evidentiary matter in dependency proceedings, the Department of Children and Families (DCF), as the usual petitioner, is obligated to prove one of the statutory grounds for dependency by a preponderance of the evidence.<sup>24</sup> In two recent cases, the appellate courts reversed on grounds that there was not competent evidence for a finding of dependency.<sup>25</sup> In the first opinion, *M.C. v. Department of Children & Families*,<sup>26</sup> a mother appealed from a finding of dependency arguing DCF “failed to present competent, substantial evidence [to establish] prospective neglect or abuse.”<sup>27</sup> At the heart of the Department’s case was the allegation that the parent suffered from mental illness and that there was a nexus between her psychiatric disorder and potential harm to the children.<sup>28</sup> The appellate court held that there was no evidence, including expert testimony, as to “the existence, extent, or nature of [the mother’s] mental health problem,” nor whether there were any

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17. *L.J.S.*, 995 So. 2d at 1153.

18. *Id.*; see also *C.S. v. Dep’t of Children & Families*, 12 So. 3d 309, 310–11 (Fla. 4th Dist. Ct. App. 2009).

19. FLA. STAT. § 39.507(7)(a).

20. See FLA. STAT. § 39.507(7)(b).

21. 4 So. 3d 719 (Fla. 5th Dist. Ct. App. 2009).

22. *Id.* at 720.

23. *Id.* at 721.

24. See FLA. STAT. § 39.507(1)(b).

25. *M.C. v. Dep’t of Children & Families*, 993 So. 2d 1123, 1124 (Fla. 5th Dist. Ct. App. 2008); *J.R. v. Dep’t of Children & Families*, 995 So. 2d 611, 612 (Fla. 4th Dist. Ct. App. 2008).

26. 993 So. 2d at 1123.

27. *Id.* at 1124.

28. *Id.* at 1124–25.

negative effects caused by her illness upon the children's well-being.<sup>29</sup> There was simply speculation.<sup>30</sup> The court thus reversed.<sup>31</sup>

In the second case, *J.R. v. Department of Children & Families*,<sup>32</sup> a mother appealed from an order adjudicating her children dependent alleging insufficiency of the evidence.<sup>33</sup> Specifically, the mother argued that "DCF failed to present witnesses with firsthand knowledge of the allegations to support a finding of dependency based upon abandonment."<sup>34</sup> The only direct evidence was from the mother and the only substantive evidence from "DCF was uncorroborated hearsay evidence of an anonymous abuse report stating that the children had been abandoned at the great-grandmother's home."<sup>35</sup> The appellate court reversed finding that "an uncorroborated report and hearsay evidence is insufficient to support an adjudication of dependency."<sup>36</sup>

Domestic violence is not only an important societal issue but it can be grounds for a finding of dependency.<sup>37</sup> In *C.W. v. Department of Children & Families*,<sup>38</sup> a mother appealed from a trial court order adjudicating a child dependent as well as a dispositional order withholding adjudication of dependency.<sup>39</sup> The basis for the proceeding was an allegation of an incident of domestic violence in "which the mother allegedly choked the father while he was holding the three-month-old child."<sup>40</sup> The father was also alleged to have "slapped the mother during the incident."<sup>41</sup> The Department alleged that the "behavior demonstrated a wanton disregard for the presence of the child and could reasonably result in serious injury."<sup>42</sup> The father consented to the finding but the mother did not.<sup>43</sup> Florida courts have repeatedly held that domestic violence can constitute harm when "it occurs in the presence of

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29. *Id.* at 1125–26.

30. *See id.* at 1126.

31. *M.C.*, 993 So. 3d at 1126.

32. 995 So. 2d 611 (Fla. 4th Dist. Ct. App. 2008).

33. *Id.* at 611.

34. *Id.* at 612; *see also* FLA. STAT. § 90.604 (2009) (requiring personal knowledge for a witness to testify).

35. *J.R.*, 995 So. 2d at 612.

36. *Id.*

37. *See generally* Michael J. Dale, 2007–2008 Survey of Juvenile Law, 33 NOVA L. REV. 357, 357–63 (2009) [hereinafter Dale, 2007–2008 Survey].

38. 10 So. 3d 136 (Fla. 1st Dist. Ct. App. 2009).

39. *Id.* at 137.

40. *Id.*

41. *Id.*

42. *Id.*

43. *C.W.*, 10 So. 3d at 137.



a child.”<sup>44</sup> However, the courts have also held that there must be more than the child’s physical proximity to the events in order to make a finding of dependency.<sup>45</sup> There must be an evidentiary showing “that the child saw or was aware of the violence” that occurred and that the violence resulted “in some physical or mental injury to the child.”<sup>46</sup> In the *C.W.* case, “the trial court made no findings that the three-month-old child was aware of the incident or was physically or mentally harmed.”<sup>47</sup> Nor was there any evidence that the infant comprehended the incident.<sup>48</sup> The appellate court thus ruled that absent “any evidentiary finding that the child appreciated or suffered any physical or mental injury” or an evidentiary finding that the parent “posed a current threat of harm to the child, the . . . court’s finding of dependency [could not] stand.”<sup>49</sup> The court thus reversed.<sup>50</sup>

The failure of the Department of Children and Family Services to comply with Florida’s dependency statutes when interacting with parents is reported regularly in the appellate case law. In *C.J. v. Department of Children & Family Services*,<sup>51</sup> a parent appealed from an order adjudicating the child dependent.<sup>52</sup> The district court of appeal affirmed.<sup>53</sup> However, it spoke at length about the actions of the Department in the case.<sup>54</sup> The appellate court found that the Department violated the spirit as well as the letter of the statute, worked at cross purposes with the mother, was in an adversarial relationship with the mother, and distorted the matter in which the goals of chapter 39 ought to be pursued.<sup>55</sup> In sum, the court said “[t]he actions and attitudes displayed by the Department in this case are ones we cannot and do not condone.”<sup>56</sup> Nonetheless, on the facts of the case, the court affirmed.<sup>57</sup>

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44. *Id.* at 138 (citing *R.V. v. Dep’t of Children & Family Servs.*, 939 So. 2d 200, 202 (Fla. 2d Dist. Ct. App. 2006); *M.B. v. Dep’t of Children & Family Servs.*, 937 So. 2d 709, 710–11 (Fla. 2d Dist. Ct. App. 2006); *D.D. v. Dep’t of Children & Families*, 773 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 2000)); *see also* Dale, 2007–2008 Survey, *supra* note 37, at 357.

45. *C.W.*, 10 So. 3d at 138; *R.V.*, 939 So. 2d at 202; *M.B.*, 937 So. 2d at 711; *D.D.*, 773 So. 2d at 617–18; Dale, 2007–2008 Survey, *supra* note 37, at 357–58.

46. *C.W.*, 10 So. 3d at 138.

47. *Id.*

48. *See id.*

49. *Id.* at 139.

50. *Id.*

51. 9 So. 3d 750 (Fla. 2d Dist. Ct. App. 2009).

52. *Id.* at 751.

53. *Id.* at 756.

54. *See id.* at 750–56 (describing the actions of the Department).

55. *Id.* at 756.

56. *C.J.*, 9 So. 3d at 756.

57. *Id.*

### III. TERMINATION OF PARENTAL RIGHTS

Among the grounds for termination of parental rights (TPR) in Florida is incarceration of the parent.<sup>58</sup> The relevant statute provides that the termination is authorized when “the period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years.”<sup>59</sup> The appellate courts have dealt on a number of occasions with questions of just what the term “substantial portion” means. In *J.W.B. v. Department of Children & Families*,<sup>60</sup> a father who was incarcerated appealed from an order terminating his parental rights.<sup>61</sup> The appellate court found that the father had been incarcerated since the child’s birth, had never seen the child or provided financial support, and was scheduled to be released from prison when the child was approximately twelve years of age.<sup>62</sup> The court relied on a Supreme Court of Florida ruling in which the court applied a percentage to determine a substantial portion of time.<sup>63</sup> Applying that test, the court in *J.W.B.* found that the percentage was sixty percent of the time before the child turned eighteen and thus, together with other factors of noninvolvement by the parent, affirmed.<sup>64</sup>

In *S.H. v. Department of Children & Family Services*,<sup>65</sup> DCF filed an amended petition to terminate parental rights “when the children, who included twins, were two, three, and four years old.”<sup>66</sup> When the parent was to be released from prison, the children would be eight, nine, and ten.<sup>67</sup> Recognizing that the time factor was incarceration in the future and not the time the parent had been incarcerated in the past, and finding further that precedent suggested that an eight year incarceration did not constitute clear and convincing evidence of incarceration for a substantial period of time, the court reversed.<sup>68</sup>

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58. FLA. STAT. § 39.806(1)(d) (2009).

59. *Id.*

60. 8 So. 3d 1191 (Fla. 5th Dist. Ct. App. 2009).

61. *Id.* at 1192.

62. *Id.* at 1193.

63. *Id.* at 1192 (citing *B.C. v. Dep’t of Children & Families*, 887 So. 2d 1046, 1052 (Fla. 2004)).

64. *Id.* at 1193.

65. 992 So. 2d 316 (Fla. 2d Dist. Ct. App. 2008).

66. *Id.* at 317.

67. *Id.*

68. *Id.* at 317–18 (citing *B.C. v. Dep’t of Children & Families*, 887 So. 2d 1046, 1055 (Fla. 2004) (per curiam); *J.P.C. v. Dep’t of Children & Family Servs.*, 819 So. 2d 264, 266 (Fla. 2d Dist. Ct. App. 2002)).

A second ground for termination of parental rights in Florida, as is the case in other jurisdictions, is abandonment.<sup>69</sup> Abandonment is defined in chapter 39 and, as most recently amended, provides that the parent “makes no provision for the child’s support and has failed to establish or maintain a substantial and positive relationship with the child.”<sup>70</sup> This includes frequent regular contact with the child and exercising parental responsibility.<sup>71</sup> Marginal efforts are not enough.<sup>72</sup> The issue before the appellate court in *T.G. v. Department of Children & Families*,<sup>73</sup> was whether termination was appropriate on abandonment grounds, where included among the factual information was the fact that the mother “failed to visit [the children] for over a year prior to the final hearing.”<sup>74</sup> Mississippi’s law includes a one year time frame and Missouri’s a six month time frame.<sup>75</sup> The court applied the one year time period as well as other facts presented to the trial court and affirmed the termination.<sup>76</sup>

Another ground for termination of parental rights in Florida is when there is abuse of a sibling and a nexus is found between abuse of the sibling and the prospective abuse of the child who is the subject of the proceeding.<sup>77</sup> In addition, in any termination of parental rights case, the court must also find that the manifest best interests of the child requires termination and that termination is in the child’s best interests.<sup>78</sup> In *T.L. v. Department of Children & Family Services*,<sup>79</sup> a father appealed from termination of parental rights because the trial court failed to base its decision “on evidence demonstrating that the [f]ather posed a threat of prospective harm to” the child, but instead terminated parental rights because it thought that “offering services to the [f]ather would result in an unwarranted delay in achieving permanency

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69. FLA. STAT. § 39.806(1)(b) (2009).

70. FLA. STAT. § 39.01(1).

71. *Id.*

72. *Id.*

73. 8 So. 3d 1198 (Fla. 4th Dist. Ct. App. 2009).

74. *Id.* at 1199.

75. *Id.* at 1199–1200 (citing *In re A.M.A.*, 986 So. 2d 999, 1010 (Miss. Ct. App. 2007), *cert. denied*, 987 So. 2d 451 (Miss. 2008); *In re J.W.*, 11 S.W.3d 699, 703 (Mo. Ct. App. 1999)).

76. *Id.* at 1200.

77. See *A.D. v. Dep’t of Children & Family Servs.*, 870 So. 2d 235, 238 (Fla. 2d Dist. Ct. App. 2004). The nexus issue also comes up in dependency cases. See Dale, 2007–2008 Survey, *supra* note 37, at 363–64. As to the nexus test in TPR cases, see Michael J. Dale, 2005–2006 Survey of Juvenile Law, 31 NOVA L. REV. 577, 594–95 (2007) [hereinafter Dale, 2005–2006 Survey].

78. FLA. STAT. § 39.810 (2009); *G.W.B. v. J.S.W.*, 658 So. 2d 961, 973 (Fla. 1995).

79. 990 So. 2d 1267 (Fla. 2d Dist. Ct. App. 2008).

for the child.”<sup>80</sup> The appellate court held that the trial court was correct in finding that there had been egregious abuse by the father of the sibling of the child who was before the court for failing to take appropriate steps to obtain necessary care for the other child.<sup>81</sup> However, there was no competent evidence of the nexus requirement in the sense of a “predictive relationship between the past abuse of the injured child” and prospective abuse of the sibling before the court as required under Florida law.<sup>82</sup> Specifically, the trial court had before it no psychological assessment that would show “that the [f]ather lacked self-control,” had a drug addiction problem, or suffered from “a mental or emotional condition” that would produce the nexus between the injury to the sibling and the threat of prospective harm to the child.<sup>83</sup> Finally, the appellate court found that “there was no evidence that the [f]ather would not benefit from court-ordered services,” and thus the trial court failed to show that termination was the least restrictive means to protect the child.<sup>84</sup> The appellate court thus reversed.<sup>85</sup>

Evidentiary issues arise in TPR proceedings just as they do in dependency matters. In *F.B. v. Department of Children & Family Services*,<sup>86</sup> both the Department of Children and Family Services and the Guardian ad Litem Program, as parties to the proceedings, conceded “the court’s termination order [was] legally insufficient because it contain[ed] only a conclusory statement that termination of . . . parental rights would be in the manifest best interests of the child.”<sup>87</sup> However, the appellate court also reversed based on insufficient evidence.<sup>88</sup> The issue which the court discussed was hearsay.<sup>89</sup> At the termination hearing, the trial court took judicial notice<sup>90</sup> of a file which contained shelter documents, orders of the court including the dependency judgment and the case plan.<sup>91</sup> It also “contained an assessment of the child” which the mother had “reported to have said that [the father] refused to acknowledge paternity.”<sup>92</sup> Inexplicably, the father’s lawyer “did not make

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80. *Id.* at 1270.

81. *Id.* at 1272.

82. *Id.* (citing *K.A. v. Dep’t of Children & Family Services*, 880 So. 2d 705, 709 (Fla. 2d Dist. Ct. App. 2004)).

83. *Id.* at 1273.

84. *T.L.*, 990 So. 2d at 1273.

85. *Id.*

86. 4 So. 3d 684 (Fla. 2d Dist. Ct. App. 2009).

87. *Id.* at 685.

88. *Id.*

89. *Id.* at 686.

90. See FLA. STAT. §§ 90.202, .203 (2009).

91. *F.B.*, 4 So. 3d at 686.

92. *Id.*

any hearsay objections to the documents encompassed within the request for judicial notice,” according to the appellate court.<sup>93</sup> More apparent was the objection to an improper request for judicial notice under the *Florida Rules of Evidence* although there is no reference to that in the opinion.<sup>94</sup> Despite these failures to object, the appellate court held that “the Department failed to show by clear and convincing evidence that [the father] was able [to] but failed to provide for the child” under the abandonment provision of chapter 39 of the *Florida Statutes*.<sup>95</sup> The court found that the only evidence presented by the Department was hearsay and thus inadmissible, and the only competent evidence was that of the father who claimed “he had never denied paternity and that he had tried without success to locate the mother.”<sup>96</sup> The appellate court therefore reversed.<sup>97</sup>

The second evidentiary opinion at the TPR stage is *M.E. v. Department of Children & Families*.<sup>98</sup> In *M.E.*, the appellate court applied the clear and convincing evidence standard in reversing the finding of termination of parental rights.<sup>99</sup> It did so because the trial court had “found the evidence troubling” because of gaps of proof including a lack of any evidence or records of “any mental health professional treating [the] appellant” parent.<sup>100</sup> It also found “‘obvious’ errors in the testimony of the ‘only professional’ who testified and a ‘certain vagueness even on subjects where the [professional] appeared to be reasonably accurate.’”<sup>101</sup> The appellate court reversed because it found that the trial court “was not convinced without hesitancy that the evidence warranted the termination of appellant’s parental rights,” and thus the appellate court could not “say that competent, substantial evidence support[ed] the court’s finding that the evidence was clear and convincing.”<sup>102</sup>

During the course of child welfare proceedings, including dependency matters and TPR cases, a child’s placement may be changed under Florida law.<sup>103</sup> However, the test for that change is one of the child’s best interests.<sup>104</sup> Florida law further states that when the child is first placed with the

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93. *Id.*

94. *See* FLA. STAT. §§ 90.201–.204.

95. *Id.* at 686–87; *see* FLA. STAT. §§ 39.01(1), .809(1) (2007).

96. *F.B.*, 4 So. 3d at 686.

97. *Id.* at 687.

98. 1 So. 3d 268 (Fla. 1st Dist. Ct. App. 2009).

99. *Id.* at 268–69; *see Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

100. *M.E.*, 1 So. 3d at 269.

101. *Id.*

102. *Id.*

103. *See* FLA. STAT. § 39.521 (2009).

104. FLA. STAT. § 39.521(1)(b)(1), (1)(d)(8)(b).

Department because there is no suitable relative, there is no obligation to later place the child with a relative “if it is in the child’s best interest to remain in the current placement.”<sup>105</sup> In *Guardian Ad Litem Program v. R.A.*,<sup>106</sup> the guardian ad litem (GAL), according to the court, appealed from “an order granting [the] father’s motion to change the placement of his daughter” from the foster parent’s home to that of the grandmother.<sup>107</sup> While the appellate court describes the matter as an appeal by the guardian ad litem, it would appear, given the caption of the case, that the appeal was by the Guardian Ad Litem Program,<sup>108</sup> as the Guardian Ad Litem Program was a party to the proceeding pursuant to chapter 39 of the *Florida Statutes*.<sup>109</sup> When the trial court ordered a transfer of placement, the Guardian Ad Litem Program appealed.<sup>110</sup> Treating the matter as a non-final order and thus describing the appeal as a petition for writ of certiorari, the appellate court reversed.<sup>111</sup> Finding that the evidence at the trial level was that it was in the child’s best interest to remain in the current foster home, the court reversed concluding that the trial court failed to follow the clear statutory directions which were based upon a best interest standard.<sup>112</sup>

In 2004, the Supreme Court of Florida decided *Florida Department of Children & Families v. F.L.*,<sup>113</sup> which held that in an involuntary termination of parental rights case, the Department must prove by clear and convincing evidence that there was a substantial risk of significant harm to the child before the court then decides whether termination of parental rights “is the least restrictive means of protecting the child from . . . harm.”<sup>114</sup> Application of the *F.L.* test was before the Fourth District Court of Appeal in *J.J. v. Department of Children & Families*.<sup>115</sup> The appellate court first found that the trial court in *J.J.* made a series of errors by basing termination of parental rights in part on testimony that a parent failed to admit abuse, and that the parent lacked financial resources to provide for the child, as well as failing to

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105. FLA. STAT. § 39.521(1)(d)(8)(b).

106. 995 So. 2d 1083 (Fla. 5th Dist. Ct. App. 2008).

107. *Id.* at 1083.

108. *See id.*

109. FLA. STAT. § 39.01(51).

110. *R.A.*, 995 So. 2d at 1083.

111. *Id.* at 1084 n.1, 1085. As to the proper method for raising an appeal from a non-final order, see FLA. R. APP. P. 9.040(b)(2)(C); *R.J. v. Guardian Ad Litem Program*, 993 So. 2d 176, 177 (Fla. 5th Dist. Ct. App. 2008) (per curiam).

112. *R.A.*, 995 So. 2d at 1083–84.

113. 880 So. 2d 602 (Fla. 2004) (per curiam).

114. *Id.* at 608 (quoting *Padgett v. Dep’t of Health & Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991)).

115. 994 So. 2d 496, 501 (Fla. 4th Dist. Ct. App. 2008).

“include the passage of time and positive changes in a parent’s circumstances.”<sup>116</sup> Finally, the appellate court concluded that DCF had expedited termination of parental rights, “did not offer the mother a case plan for the” children before the court, “did not obtain a psychological evaluation of the mother to assist the court,” and thus failed to offer opportunities to the mother to prove her ability to care for the children.<sup>117</sup> Failure to do so showed that there was a failure to prove that termination of parental rights was the least restrictive means to assist the parent.<sup>118</sup>

The least restrictive means test in the termination of parental rights cases was also before the Fifth District Court of Appeal in *C.A.T. v. Department of Children and Families*.<sup>119</sup> In that case, “[t]he father was not offered a case plan for reunification prior to initiation of the . . . termination proceeding.”<sup>120</sup> In an earlier dependency case involving the child who was the subject of the TPR proceeding, the father had been found to be non-offending despite the fact that he had refused a case plan.<sup>121</sup> In fact, he had not received any services from DCF “since his participation in the original case plan in 2002” in a prior proceeding.<sup>122</sup> In the TPR proceeding, “he was never offered a case plan with services as an alternative to losing his parental rights in the current proceeding[.]”<sup>123</sup> Of course under Florida law, DCF does not have to provide a case plan for reunification.<sup>124</sup> DCF can show that the parent will not benefit from court-ordered services.<sup>125</sup> Because the Department did not prove “that the father was not amenable to remedy his problems through actual, appropriate services,” the court reversed.<sup>126</sup>

In addition, however, in dicta, the court noted that the father was not “a model parent.”<sup>127</sup> Judge Sawaya, writing for the court, then made the following statement:

We are not aware of a precise definition that tells us what a model parent is. Perhaps it is nothing more than a mythical figure, much

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116. *Id.* at 502.

117. *Id.* at 503.

118. *Id.*

119. 10 So. 3d 682 (Fla. 5th Dist. Ct. App. 2009).

120. *Id.* at 684.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See C.A.T.*, 10 So. 3d at 684; FLA. STAT. § 39.806(3) (2009).

125. *See, e.g., T.L. v. Dep’t of Children and Family Servs.*, 990 So. 2d 1267, 1273 (Fla. 2d Dist. Ct. App. 2008).

126. *C.A.T.*, 10 So. 3d at 685–86.

127. *Id.* at 685.

like the reasonable person in tort law, that good parents should seek to emulate. Although it may be inescapable that many will assume that mothers and fathers may not be model parents if DCF has intervened in their lives to protect their child[ren] from harm, the law does not profess to require parental perfection. Indeed, the provisions contained in chapter 39 reveal an acute awareness that many parents, like the father in the instant case, are in need of assistance to achieve the necessary skills to simply be adequate parents who do not harm, neglect or abuse their children.<sup>128</sup>

The issue of whether ineffective assistance of counsel claims can be made in TPR proceedings remains undecided in Florida.<sup>129</sup> The issue was raised again during this survey year in *L.H. v. Department of Children & Families*.<sup>130</sup> The Fifth District Court of Appeal referred to the last reported opinion in the area, *E.T. v. State, Department of Children & Families*,<sup>131</sup> decided by the Fourth District Court of Appeal in 2006, and recognized that the Supreme Court of Florida has still not ruled on this issue having “referred [the] issue to the Juvenile Court Rules Committee and the Appellate Court Rules Committee for consideration.”<sup>132</sup> The appellate court in *L.H.* also recognized that trial and appellate courts around the country struggled with the issue, and encouraged the Supreme Court of Florida and the committees “to provide guidance on this important issue.”<sup>133</sup> On a motion for rehearing, clarification and certification, the district court of appeal certified the question of recognition of a claim for ineffective assistance of counsel to the Supreme Court of Florida.<sup>134</sup>

The issue of a parent’s nonappearance at a termination of parental rights proceeding has come up regularly before the appellate courts.<sup>135</sup> Florida law provides that the failure to personally appear can constitute consent to terminate parental rights.<sup>136</sup> The issue arose again in *L.S. v. Department of Child-*

128. *Id.*

129. *See E.T. v. State, Dep’t of Children & Families*, 930 So. 2d 721, 729 (Fla. 4th Dist. Ct. App. 2006).

130. 995 So. 2d 583, 583–84 (Fla. 5th Dist. Ct. App. 2008).

131. 930 So. 2d 721 (Fla. 4th Dist. Ct. App. 2006).

132. *L.H.*, 995 So. 2d at 584 (citing *E.T. v. State*, 957 So. 2d 559, 599 (Fla. 2007) (per curiam)).

133. *Id.* at 585. *See also* 1 MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT, § 4.06[1][c] (2009).

134. *L.H.*, 995 So. 2d at 585. *See also* Dale, 2005–2006 Survey, *supra* note 77, at 599; Michele R. Forte, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193, 194–95 (2003).

135. *See* Dale, 2007–2008 Survey, *supra* note 37, at 371.

136. FLA. STAT. § 39.801(3)(a)(7) (2009).



*ren & Family Services*.<sup>137</sup> In this case, the mother argued on appeal “that the trial court abused its discretion in refusing to allow her to appear by telephone to explain her absence from the adjudicatory hearing” and concluding that “her nonappearance [was] consent to the termination of her parental rights.”<sup>138</sup> The appellate court agreed and reversed.<sup>139</sup> The mother’s counsel did appear “at the scheduled adjudicatory hearing and informed the court that the mother was out of state and unable to personally appear because of financial difficulties.”<sup>140</sup> The counsel further “advised the court that the mother was available to appear by telephone” and that she should be given that opportunity to explain why “she was unable to appear in person.”<sup>141</sup> Both DCF and the guardian ad litem (GAL) objected.<sup>142</sup> Specifically the GAL said that “‘there’s a history here of the mother not showing, and I think this is just indicative of a pattern.’”<sup>143</sup> The appellate court held that the GAL statement “was disputed at the hearing by the mother’s counsel and [was] not supported by the record.”<sup>144</sup> Under these circumstances, the appellate court reversed concluding “the trial court should have allowed the mother the opportunity to appear by telephone to explain the reasons for her nonappearance instead of entering a default.”<sup>145</sup>

In a second consent to TPR case, *J.M. v. Department of Children & Families*,<sup>146</sup> although the court had warned the parent at three prior hearings that “her failure to attend the adjudicatory hearing would constitute consent to the petition,” at the hearing when the court continued the matter for a third time, it “failed to advise the mother that she must personally appear at the reset date.”<sup>147</sup> She did not appear, sending “word that she was attending [to] matters regarding the recent death of her father.”<sup>148</sup> However, although never moving to vacate the consent, the mother then did participate with the approval of the court on the further days of the proceeding.<sup>149</sup> The trial court found that the DCF had proved termination by clear and convincing evi-

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137. 995 So. 2d 516 (Fla. 2d Dist. Ct. App. 2008).

138. *Id.* at 517.

139. *Id.*

140. *Id.*

141. *Id.*

142. *L.S.*, 995 So. 2d at 517.

143. *Id.*

144. *Id.*

145. *Id.*; see Dale, 2007–2008 Survey, *supra* note 37, at 371 (collecting case law on this issue).

146. 9 So. 3d 34 (Fla. 4th Dist. Ct. App. 2009).

147. See *id.* at 36.

148. *Id.*

149. *Id.*

dence.<sup>150</sup> The appellate court thus ruled that the failure “to order the mother to appear on the hearing date at which the adjudicatory hearing actually commenced” was an “oversight” and thus “the court should not have entered a consent to the petition.”<sup>151</sup> However, the court did not reverse because the mother was given a full opportunity to participate in the proceeding and the court ruled that DCF had met its burden.<sup>152</sup>

Florida’s law regarding who is a party to a dependency in a termination of parental rights case is expansive.<sup>153</sup> It includes “the parent or parents of the child, the petitioner, the department, the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child.”<sup>154</sup> In a termination of parental rights proceeding, the individuals who may appeal under Florida law are “[a]ny child, any parent or guardian ad litem of any child, any other party to the proceeding who is affected by an order of the court, or the department.”<sup>155</sup> Thus, a review of recent reported appellate opinions shows that parents, the Department, and the Guardian ad Litem Program regularly appeal. In *R.H. v. Department of Children & Family Services*,<sup>156</sup> the child’s grandparents, who were not parties to the proceeding below, sought to challenge the trial court order modifying placement of the granddaughter whose parents’ parental rights had been terminated, and which order placed the child “in the temporary legal custody of her paternal aunt and uncle.”<sup>157</sup> Reviewing the statutes in question concerning party status at the trial level and on appeal, the appellate court ruled that the grandparents lacked standing to challenge the order on appeal.<sup>158</sup>

#### IV. SURRENDER OF PARENTAL RIGHTS

While most case law concerns involuntary termination of parental rights, a parent may voluntarily surrender parental rights pursuant to chapter

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150. *Id.*

151. *J.M.*, 9 So. 3d at 36.

152. *See id.* at 36–37.

153. *See* FLA. STAT. § 39.01(51) (2009).

154. *Id.* Despite the statutory references to the Guardian ad Litem Program as a party to a proceeding in chapter 39, both the Fourth and Fifth District Courts of Appeal have raised the issue of the Guardian ad Litem Program’s standing as a party. *See* Dep’t of Children & Families v. S.T., 963 So. 2d 314, 315 (Fla. 4th Dist. Ct. App. 2007); Dep’t of Health & Rehabilitative Servs. v. Cole, 574 So. 2d 160, 163 (Fla. 5th Dist. Ct. App. 1990).

155. FLA. STAT. § 39.815(1).

156. 994 So. 2d 1153 (Fla. 3d Dist. Ct. App. 2008).

157. *Id.* at 1154.

158. *Id.* at 1154–55 (citing *C.M. v. Dep’t of Children & Families*, 981 So. 2d 1272, 1272 (Fla. 1st Dist. Ct. App. 2008); *D.M. v. State, Dep’t of Children & Family Servs.*, 980 So. 2d 498, 498 (Fla. 2d Dist. Ct. App. 2008)).

39 of the *Florida Statutes*.<sup>159</sup> The proper procedure for doing so was before the Fifth District Court of Appeal in *R.B. v. Department of Children & Families*.<sup>160</sup> A mother appealed “an order denying her motion to set aside the surrender of her parental rights to her two children.”<sup>161</sup> After her two children were removed and sheltered and at an arraignment hearing, there was a representation that the mother was interested in signing paperwork to surrender parental rights.<sup>162</sup> After conferring with her counsel, the mother was “placed under oath and signed the ‘Affidavit and Acknowledgment of Surrender of Parental Rights, Consent, and Waiver of Notice’ forms” which were witnessed by counsel and a bailiff.<sup>163</sup> Because the mother’s counsel suggested to the general master that his client “had indicated she might be mentally unstable, . . . the general master asked several pertinent questions.”<sup>164</sup> The master found that the surrender was “knowingly, freely, and voluntarily executed,” and the trial court accepted it.<sup>165</sup> “Five months later, with new counsel,” the mother moved to set aside the voluntary surrender.<sup>166</sup> The appellate court found, first, that the general master had authority to “‘administer oaths and conduct hearings’ [and thus] inherently had the power to take acknowledgment”; and, second, that there was no showing of fraud or duress.<sup>167</sup> The appellate court noted that the burden of proof by clear and convincing evidence to vacate the surrender rests on the parent.<sup>168</sup> The appellate court thus affirmed.<sup>169</sup>

## V. JUVENILE DELINQUENCY

Once a court in a juvenile delinquency case holds an adjudicatory hearing and finds that the child has committed an act, which if committed by an adult would be a crime under chapter 985, the court proceeds to a dispositional hearing.<sup>170</sup> States differ as to the degree of discretion that the juvenile court has in making a disposition.<sup>171</sup> Florida’s dispositional statute contains a

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159. FLA. STAT. § 39.806(1)(a).

160. 997 So. 2d 1216 (Fla. 5th Dist. Ct. App. 2008).

161. *Id.* at 1217.

162. *Id.*

163. *Id.*

164. *Id.*

165. *R.B.*, 997 So. 2d at 1217.

166. *Id.*

167. *Id.* at 1217–18.

168. *Id.* at 1218.

169. *Id.*

170. FLA. STAT. §§ 985.35, .43 (2009).

171. 1 DALE, *supra* note 133, at § 5.03[13][a].

list of alternatives and further provides that the Department of Juvenile Justice (DJJ) shall recommend a disposition to the court.<sup>172</sup> In *E.A.R. v. State*,<sup>173</sup> the issue before the Supreme Court of Florida was whether the juvenile court must “justify departures from the Department of Juvenile Justice’s (DJJ) recommended dispositions by explaining a judge’s ‘reasons’ for a departure.”<sup>174</sup> It must do so in terms of the “characteristics of the imposed restrictiveness level” under the *Florida Statutes* as compared to “the rehabilitative needs of the child.”<sup>175</sup> In a lengthy opinion, including a detailed exposition of the particular case before the Court, and with a strong dissent with two concurrences, the Court set out a test by which the juvenile court should “provide ‘reasons’ that explain, support, and justify why one restrictiveness level is more appropriate than another and thereby rationalize a departure disposition.”<sup>176</sup> The Supreme Court of Florida held that the trial court should:

Articulate an understanding of the respective characteristics of the opposing restrictiveness levels including (but not limited to) the type of child that each restrictiveness level is designed to serve, potential “lengths of stay” associated with each level, and the divergent treatment programs and services available to the juvenile at these levels; and [t]hen logically and persuasively explain why, in light of these differing characteristics, one level is better suited to serving both the rehabilitative needs of the juvenile—in the least restrictive setting—and maintaining the ability of the State to protect the public from further acts of delinquency.<sup>177</sup>

*M.J.S. v. State*<sup>178</sup> and *D.B. v. State*<sup>179</sup> are cases the district courts of appeal decided after the opinion in *E.A.R.* *M.J.S.* described the opinion in *E.A.R.* as “a new, more rigorous analysis in which a trial court must engage before departing from the DJJ’s recommendation.”<sup>180</sup> In *D.B.*, the trial court failed to comply with the new standard and thus the appellate court reversed and remanded.<sup>181</sup>

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172. See FLA. STAT. § 985.03(21); FLA. R. JUV. P. 8.115.

173. 4 So. 3d 614 (Fla. 2009).

174. *Id.* at 616–17 (internal footnote omitted).

175. *Id.* at 617.

176. *Id.* at 638.

177. *Id.*

178. 6 So. 3d 1268 (Fla. 1st Dist. Ct. App. 2009) (per curiam).

179. 12 So. 3d 875 (Fla. 4th Dist. Ct. App. 2009).

180. *M.J.S.*, 6 So. 3d 12 at 1269.

181. *D.B.*, 12 So. 3d at 876.

In Florida, secure detention either pretrial or after adjudication, is specifically controlled by statute.<sup>182</sup> When trial judges act in contravention of the time frames set forth in the statute, writs of habeas corpus are taken seeking discharge.<sup>183</sup> In *M.A.M. v. Vurro*,<sup>184</sup> a juvenile sought relief arguing that he could not be held in secure detention under the twenty-one day rule found in Florida law.<sup>185</sup> A situation in which a child who might “not otherwise meet the secure detention criteria” may be held in secure detention is when the court makes certain findings “that respite care is unavailable and that secure detention is required to prevent victim injury.”<sup>186</sup> The appellate court in *M.A.M.* concluded that under Florida law, the court may not order “a child charged with domestic violence [to] be held in secure detention for more than twenty-one days in total.”<sup>187</sup> The two separate sections may not be used in combination.<sup>188</sup> On this ground, the court granted the writ.<sup>189</sup>

Where a child in a delinquency case is incompetent to proceed, after a hearing, the court may order the child placed in a secure residential facility.<sup>190</sup> Thus, the finding of involuntary commitment requires clear and convincing evidence that there is a substantial likelihood that the child would inflict serious bodily harm on himself or others.<sup>191</sup> This was the issue in *A.L.M. v. Department of Children & Families*.<sup>192</sup> The child sought certiorari and habeas corpus relief from the order committing him to DCF under the secure placement statute.<sup>193</sup> The appellate court reviewed the facts of the case finding that, “[a]lthough three psychologists testified, their testimony did not support, by clear and convincing evidence, the trial court’s finding that . . . there was a ‘substantial likelihood’” of infliction of serious bodily harm by the child upon himself or others.<sup>194</sup> The court thus granted the writ.<sup>195</sup>

It would appear obvious that a juvenile delinquency case is not a matter in which a child is described as a criminal, nor one in which the child is con-

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182. See FLA. STAT. §§ 985.24(1), .245(1), .25, .255 (2009).

183. See, e.g., *M.A.M. v. Vurro*, 2 So. 3d 388, 389 (Fla. 2d Dist. Ct. App. 2009).

184. 2 So. 3d 388 (Fla. 2d Dist. Ct. App. 2009).

185. *Id.* at 389.

186. *Id.* at 390; FLA. STAT. § 985.255(2).

187. *M.A.M.*, 2 So. 3d at 390.

188. See *id.*

189. *Id.* at 390–91.

190. Fla. R. Juv. P. 8.095.

191. See FLA. STAT. § 985.19(3).

192. 995 So. 2d 1085 (Fla. 4th Dist. Ct. App. 2008).

193. *Id.* at 1085.

194. *Id.* at 1086.

195. *Id.*

victed of a crime.<sup>196</sup> Nonetheless, in *D.A. v. State*,<sup>197</sup> a child was obligated to appeal from a trial order imposing the cost of prosecution pursuant to the criminal law cost payment statute in Florida.<sup>198</sup> The appellate court reversed, pointing to the variety of provisions in the Florida Juvenile Delinquency Statute and case law that stand for the proposition that an adjudicated delinquent has not been convicted and is not a criminal.<sup>199</sup> Conditions of probation are among the dispositional alternatives the court may impose upon a child.<sup>200</sup> The issue in *J.W.J. v. State*<sup>201</sup> was whether special conditions of probation were both orally announced and whether they were permissible.<sup>202</sup> The court in *J.W.J.* held that where the special condition of probation is statutorily authorized, there is no obligation to orally announce the condition.<sup>203</sup> The court reversed in part based upon the state's concession that certain aspects of the special condition did not comply with state law or were not orally pronounced.<sup>204</sup>

The dispositional alternative of restitution comes up regularly in the appellate courts in substantial numbers despite the fact that the matter is one of statutory construction.<sup>205</sup> In *J.C. v. State*<sup>206</sup> the order of restitution dealt with the theft of four pocket bikes from a store owner.<sup>207</sup> On appeal, the child argued that the owner "purchased the bikes wholesale and could not sell them at their marked retail prices [and therefore] restitution should [be] limited to the wholesale price."<sup>208</sup> The appellate court affirmed, finding "that the trial court did not abuse its discretion in valuing the bikes at a discounted retail price."<sup>209</sup>

A juvenile appealed a restitution award claiming that it should be reversed because it included the amount "for a purse, three pairs of sunglasses, and sixty CDs," in *G.P. v. State*.<sup>210</sup> Apparently, the petition for delinquency

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196. See *In re Gault*, 387 U.S. 1, 17 (1967).

197. 11 So. 3d 423 (Fla. 4th Dist. Ct. App. 2009).

198. *Id.* at 423; see FLA. STAT. § 938.27(1) (2009).

199. *D.A.*, 11 So. 3d at 423–24 (citing FLA. STAT. § 985.35(6); *A.M.P. v. State*, 927 So. 2d 97, 100 (Fla. 5th Dist. Ct. App. 2006)).

200. See FLA. STAT. § 985.435.

201. 994 So. 2d 1223 (Fla. 1st Dist. Ct. App. 2008).

202. *Id.* at 1224.

203. *Id.* at 1226.

204. *Id.* at 1227.

205. See Dale, 2007–2008 Survey, *supra* note 37, at 378–79; Dale, 2005–2006 Survey, *supra* note 77, at 590–91.

206. 3 So. 3d 346 (Fla. 2d Dist. Ct. App. 2008).

207. *Id.* at 346.

208. *Id.*

209. *Id.*

210. 996 So. 2d 920, 921 (Fla. 4th Dist. Ct. App. 2008).

charged the child with “theft of miscellaneous jewelry and/or clothing” but did not list the particular items in the charging document.<sup>211</sup> Finding that the jewelry and clothing may be included in the term miscellaneous jewelry and/or clothing but that the CDs could not, the court held that the latter could not be contained in the restitution award.<sup>212</sup>

Finally, in *J.A.B. v. State*,<sup>213</sup> the child appealed an order requiring restitution “in the amount of \$1479.09 at the rate of \$50 per month, commencing on a specified date approximately four months after the entry of the restitution order.”<sup>214</sup> The child’s argument on appeal was that the “court abused its discretion in setting the amount and payment schedule for restitution.”<sup>215</sup> In *J.A.B.*, the appellate court sitting en banc, and receding from prior opinions in that district, ruled that a “trial court may set the restitution amount and payments in a reasonable amount based upon evidence [showing] the earnings [that] the [child] may reasonably be expected to make.”<sup>216</sup> The court may also “set a commencement date for the payments so long as the court provides a reasonable amount of time for the [child] to obtain employment.”<sup>217</sup> In so doing, the court in *J.A.B.* noted the conflict with the First District Court of Appeal decision in *J.A.M. v. State*.<sup>218</sup> On this basis, the court in *J.A.B.* certified the conflict.<sup>219</sup>

## VI. OTHER MATTERS

Several changes in the *Florida Statutes* in 2009 require brief discussion. Section 39.0016 was amended to provide dependency courts and district school superintendents with the ability to appoint surrogate parents for children under the Individuals with Disabilities Education Act.<sup>220</sup> Under Florida law, where the child is suspected of having special education needs and where a parent cannot be located, the responsibilities of the surrogate parent under the federal law must be implemented.<sup>221</sup>

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211. *Id.*

212. *Id.*

213. 993 So. 2d 1150 (Fla. 2d Dist. Ct. App. 2008) (en banc).

214. *Id.* at 1150.

215. *Id.* at 1151.

216. *Id.*

217. *Id.*

218. 601 So. 2d 278, 278–79 (Fla. 1st Dist. Ct. App. 1992) (per curiam).

219. *J.A.B.*, 993 So. 2d at 1155.

220. Act effective July 1, 2009, ch. 2009-35, 2009 Fla. Laws 319 (codified as amended in FLA. STAT. § 39.0016, 402).

221. FLA. STAT. § 39.0016(3).

Chapter 39 has been amended by adding the “Give Grandparents and Other Relatives a Voice Act” which ensures that relatives are to be provided with notice of all dependency hearings and proceedings.<sup>222</sup> Chapter 39 also has been amended to require the court to ask the parent’s consent to provide access to a child’s medical and educational records, and to provide that information to the court, the lead community agency (CBC), the guardian ad litem, and any attorneys for the child.<sup>223</sup> If the parent cannot do so or is unwilling to do so, the court may issue an order granting access.<sup>224</sup>

Significantly, Florida law was also changed to have the CBC and the local education agency work together to see to it that a child remain in the school where he or she was enrolled at the time of placement in the child welfare system, a matter that has first been institutionalized in Broward County in the settlement of a federal lawsuit in 2000.<sup>225</sup>

## VII. CONCLUSION

The Supreme Court of Florida decided one significant case in the delinquency area explaining the test by which a trial court determines that it shall override a dispositional recommendation of the State Department of Juvenile Justice.<sup>226</sup> The state’s intermediate appellate courts, on the other hand, were quite busy ruling in dependency, termination of parental rights, and delinquency cases on a number of statutory issues. In two cases, one involving the interpretation of the delinquency restitution statute and the other involving ineffective assistance of counsel in termination of parental rights cases, the appellate courts suggested that the Supreme Court of Florida should resolve those issues.<sup>227</sup>

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222. Zahid Jones, Jr., Give Grandparents and Other Relatives a Voice Act, ch. 2009-43, 2009 Fla. Laws 343–44, 348 (codified as amended in scattered sections of chapter 39 of FLA. STAT.).

223. Ch. 2009-35 Fla. Laws at 322.

224. FLA. STAT. § 39.402(1).

225. Ch. 2009-35 Fla. Laws at 323; Order Approving Settlement Agreement, Ward v. Kearney, No. 98-7137- Civ-Moreno (S.D. Fla. May 31, 2000).

226. E.A.R. v. State, 4 So. 3d 614, 616–17 (Fla. 2009).

227. See, e.g., L.H. v. Dep’t of Children & Families., 995 So. 2d 583, 585 (Fla. 5th Dist. Ct. App. 2008).



# THE IMMIGRATION ENFORCEMENT MULTIPLIER: EXAMINATION OF INA SECTION 287(G) IN LIGHT OF FLORIDA’S MEMORANDUM OF UNDERSTANDING

ADAM BLANK\*

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## I. INTRODUCTION

Proponents of greater enforcement of the nation's immigration laws need only cite one statistic to advocate their point of view. "Three 9/11 hijackers—Mohammed Atta, Hani Hanjour, and Ziad Jarrah—came into contact with state and local police before the attacks for speeding."<sup>1</sup>

Atta was stopped by police in Tarmac [sic], Florida, in July 2001 and was ticketed for having an invalid license. He ignored the ticket and a bench warrant was issued for his arrest. He was stopped a few weeks later in a town nearby for speeding and the officer, unaware of the bench warrant, let him go with a warning. Hijacker Mohammed Atta is believed to have piloted American Airlines Flight 11 into the World Trade Center's north tower.<sup>2</sup>

During contact with law enforcement, Mohammed Atta "was illegally present in the United States."<sup>3</sup> In a post-September 11th world, knowing that several hijackers came into contact with law enforcement while their immigration status was in question is certainly troublesome. This fact has fueled the national debate as to whether local law enforcement should be more engaged in enforcing federal immigration laws.

The debate is fueled not only by grand incidents on a national scale like the 9/11 attacks, but also by gruesome crimes that leave local communities in shock.<sup>4</sup> In 2002, for example, "Miguel Angel Heredia Juarez, an illegal alien from Mexico, was convicted for viciously raping and beating a 19-year old . .

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1. *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the H. Comm. on the Judiciary*, 108th Cong. 127 (2004) (statement of Michelle Malkin, Investigative Journalist & Author).

2. *Id.* at 2 (statement of Hon. Saxby Chambliss, Sen. from the State of Georgia).

3. *The 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships: Hearing Before the Subcomm. on Mgmt., Integration, and Oversight of the H. Comm. on Homeland Security*, 109th Cong. 52 (2005) (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_house\\_hearings&docid=f:28332.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28332.pdf). A source for the federal government actually notes that four of the hijackers, illegally present in the United States, had contact with police officers. *Id.*

Four members of the 9/11 terrorist cohort were stopped by state and local law enforcement in the United States for routine traffic violations. In all four of those instances, the aliens were illegally present in the United States. (The four hijackers who were stopped by police were Nawaf al Hazmi, Mohammed Atta, Hanji Hanjour, and Ziad Jarrah.)  
*Id.* at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City of Law).

4. *See id.* at 51–53.

. woman.”<sup>5</sup> He was on probation at the time, having “been previously convicted of four other felonies, including theft and assault, since illegally crossing the Mexican border.”<sup>6</sup> Both the 9/11 terrorists and Miguel Angel Heredia Juarez were examples cited by United States Senator Saxby Chambliss during a statement to the Immigration Subcommittee regarding the authority of local police to enforce federal immigration laws.<sup>7</sup>

In 1983, the Ninth Circuit Court of Appeals clarified the role of states in enforcing this nation’s federal immigration laws.<sup>8</sup> The court held that “federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Naturalization] Act.”<sup>9</sup> The rationale for this decision is the lack of a “pervasive regulatory scheme” for enforcement of criminal provisions of the Immigration and Naturalization Act (INA), which would effectively preempt states and local governments from acting within the field of criminal immigration enforcement.<sup>10</sup> Nevertheless, the “complex administrative structure” established by the federal government over the civil provisions of the INA has effectively prevented state and local governments from enforcing civil immigration violations.<sup>11</sup>

In September of 1996, Congress amended the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), and added section 287(g).<sup>12</sup> This section authorizes the Secretary of the U.S. Department of Homeland Security (DHS), and previously the Attorney General of the United States prior to DHS’s establishment, to enter into agreements with state and local governments that empower designated officials to enforce civil violations of the immigration code.<sup>13</sup> In 2002, the State of Florida entered into a Memorandum of Understanding (MOU) with the United States Department of Justice.<sup>14</sup> This agreement established “a pilot project pursuant to

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5. *Authority to Enforce Immigration Law Hearing* (statement of Michelle Malkin, Investigative Journalist & Author), *supra* note 1, at 130.

6. *Id.*

7. *See id.* (statement of Michelle Malkin, Investigative Journalist & Author). *See generally id.* at 2 (statement of Saxby Chambliss, Sen. from the State of Georgia). Saxby Chambliss is a Republican and was elected to the United States Senate in 2002 in Georgia. Chambliss, Saxby: Biographical Information, Biographical Directory of the U.S. Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000286> (last visited Nov. 7, 2009).

8. *See Gonzales v. City of Peoria*, 722 F.2d 468, 472 (9th Cir. 1983).

9. *Id.* at 475.

10. *Id.*

11. *See id.*

12. U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g) Immigration and Nationality Act 1 (Aug. 16, 2006), *available at* <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287factsheet.pdf>.

13. *Id.*

14. *Id.* at 2.

which the Immigration and Naturalization Service (INS) authorize[d] 35 state and local law enforcement officers . . . to perform certain immigration officer enforcement functions.”<sup>15</sup> This program was renewed by Florida Governor Jeb Bush in 2003, and remains a model for federal and state cooperation in combating illegal immigration.<sup>16</sup> Federal and state officials have hailed the Florida MOU as a success and a model for future expansion of 287(g) programs. However, expansion of local enforcement of immigration laws is not without widespread concern. Minority communities worry about discrimination and harassment in the form of pretextual investigations relating to immigration violations. In addition, these programs require extensive training and funding, both for effective enforcement and to maintain working community relations. The Florida MOU is a model by which to examine the recent efforts of the federal government to expand its enforcement capabilities into local communities. This analysis is particularly important given a current desire to expand the use of 287(g) programs to aid immigration enforcement on a national scale.

## II. AUTHORITY OF STATE AND LOCAL LAW ENFORCEMENT REGARDING FEDERAL IMMIGRATION LAWS

### A. *Scope of Police Powers Defined by Case Law*

Case law has established that state and local law enforcement officers have inherent authority to enforce the criminal provisions of the INA, but not the civil provisions.<sup>17</sup> *Gonzales v. City of Peoria*<sup>18</sup> explained how civil and

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15. Memorandum of Understanding between the U.S. Dep’t of Justice (DOJ) and the State of Fla. 1 (2002), *available at* <http://www.ilw.com/immigdaily/news/2002,0729-mou.pdf> [hereinafter Memorandum of Understanding 2002]. “Under the one-year pilot program, 35 members of Florida’s Domestic Security Task Force will be trained and supervised by INS agents.” Federation for American Immigration Reform (FAIR), Florida Officers to Receive Immigration Enforcement Powers, Aug. 2002, *available at* [http://www.fairus.org/site/PageServer?pagename=research\\_research0e48](http://www.fairus.org/site/PageServer?pagename=research_research0e48).

16. Memorandum of Understanding between the U.S. Dep’t of Homeland Sec. (DHS) and the State of Fla. 7 (2003), *available at* <http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/stateofflorida.pdf> [hereinafter Memorandum of Understanding 2003].

17. See *Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983).

In examining the INA, it is crucial to distinguish the civil from criminal violations. Mere illegal presence in the U.S. is a *civil*, not criminal, violation of the INA, and subsequent deportation and associated administrative processes are civil proceedings. . . . Criminal violations of the INA . . . include, for example, 8 U.S.C. § 1324, which addresses the bringing in and harboring of certain undocumented aliens; § 1325(a), which addresses the illegal entry of aliens; and § 1326, which penalizes the reentry of aliens previously excluded or deported.

criminal provisions within the same statute could have different implications on enforcement powers of state and local police.<sup>19</sup> The most important factor for understanding the implications of INA Section 287(g) is an understanding of *why* civil and criminal provisions of the INA are treated differently.<sup>20</sup> To begin, *Gonzales* explained that:

Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized. Therefore, federal regulation of a particular field should not be presumed to preempt state enforcement activity “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”<sup>21</sup>

Under the preemption rationale discussed in *Gonzales*, a substantial difference must exist between the civil and the criminal provisions of the INA to warrant such treatment. Referring to 8 U.S.C. § 1325, the criminal provision of the INA regarding illegal entry into the United States, *Gonzales* makes the point that “[f]ederal and local enforcement have identical *purposes*—the prevention of the misdemeanor or felony of illegal entry.”<sup>22</sup> The circular rationalization of highlighting the purpose of the criminal provisions versus the civil provisions does not adequately explain why the two warrant

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LISA M. SEGHEITI ET AL., CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 4 (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf> (footnotes omitted).

18. 722 F.2d 468 (9th Cir. 1983).

19. See *id.* at 475–76.

20. See *id.* at 476.

21. *Id.* at 474 (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)) (citations omitted).

22. *Id.* (emphasis added).

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1325(a) (2006).

Title 8 U.S.C.A. § 1325(a) penalizes noncitizens who enter by eluding immigration officers at official inspection stations or by making false statements at the time of inspection. The provision previously designated a first-time commission of any of these offenses as a misdemeanor, and subsequent commissions as felonies. While the newly amended version of § 1325(a) no longer contains the words “misdemeanor” or “felony,” it still categorizes offenses as such by reference to 18 [U.S.C.] and to the penalties for each category of offense.

DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 7.19 at 7-49 (Dan Kesselbrenner ed., West 2009) (1984) (footnote omitted).

different treatment.<sup>23</sup> It is obvious that both states and the federal government would like to enforce criminal laws, but the same argument can be made for states enforcing civil violations of the INA.<sup>24</sup> In fact, given that states like Florida bear the majority of the cost of illegal immigration, states may not only have the same purpose in enforcing the civil provisions of the INA, but may actually have a greater incentive to do so.<sup>25</sup> Instead, a better way to understand the difference between criminal and civil violations of the INA is the assumption by *Gonzales* “that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”<sup>26</sup> Essentially, *Gonzales* is recognizing that civil immigration enforcement is complex, and thus has required pervasive regulation by the federal government.<sup>27</sup> This rationale recognizes that civil immigration violations require extensive training in exercising discretion, as well as access to government databases, neither of which are readily available to state and local police officers.<sup>28</sup>

B. *1996 Amendment to the Immigration and Nationality Act, Analysis of Section 287(g)*

“The Illegal Immigration Reform and Immigrant Responsibility Act . . . effective September 30, 1996, added [s]ection 287(g), performance of immigration officer functions by state officers and employees, to the Immigration

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23. See *Gonzales*, 722 F.2d at 476–77.

24. See *id.*

25. See JACK MARTIN, FED’N FOR AM. IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO FLORIDIANS 10 (2009), available at [http://www.fairus.org/site/DocServer/fla\\_study.pdf?docID=601](http://www.fairus.org/site/DocServer/fla_study.pdf?docID=601).

After closely examining costs incurred to provide K-12 education to the children of illegal aliens, unreimbursed public health care, and for incarceration of criminal aliens, FAIR concluded that the costs [of illegal immigration] to Florida taxpayers amounted to \$1.7 billion annually. In 2008, Florida’s illegal immigrant population cost state taxpayers more than \$3.8 billion per year.

*Id.* at 1.

26. *Gonzales*, 722 F.2d at 474–75.

27. *Id.* at 475.

28. See *id.* “Under current practice, state and local law enforcement officials do not have direct access to information on the immigration status of an alien.” SEGGETTI ET AL., *supra* note 17, at 19. “State and local law enforcement officials . . . have reported a variety of problems with accessing LESC [the Law Enforcement Support Center] and soliciting the help of federal immigration officials . . .” *Id.* at 20. “LESC was established in 1994 and is administered by ICE. It operates 24 hours a day, seven days a week. LESC gathers information from eight databases and several law enforcement databases, including the NCIC. In July 2003, LESC processed 48,007 inquiries.” *Id.* at 19 n.82.

and Nationality Act (INA).”<sup>29</sup> Section 287(g) of the INA (8 U.S.C. § 1357(g)) was added by section 133 of the IIRAIRA constituting “[o]ne of the broadest grants of authority for state and local immigration enforcement activity.”<sup>30</sup> Section 287(g) authorizes that

the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.<sup>31</sup>

This section is not an authorization of state and local police to obtain immigration enforcement powers at their own discretion. The usefulness of this section is in the ability of state and local governments to arrange programs tailored to their local concerns and benefiting local constituents.<sup>32</sup> This provision makes it clear, however, that any participating officers under the agreement act at the discretion and under the supervision of the Attorney General of the United States.<sup>33</sup> In fact, every aspect of a state or local officer’s involvement in any section 287(g) program must be agreed to and supervised by the Attorney General.<sup>34</sup> While section 287(g) allows states to

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29. U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 1.

30. SEGGETTI ET AL., *supra* note 17, at 12. “Section 1357(g) allows for significant flexibility. It permits state and local entities to tailor an agreement with the AG [Attorney General] to meet local needs, contemplates the authorization of multiple officers, and does not require the designated officers to stop performing their local duties.” *Id.*

31. 8 U.S.C. § 1357(g)(1) (2006). Note that this provision is the same as INA section 287(g). *See* SEGGETTI ET AL., *supra* note 17, at 14.

32. James Jay Carafano, *Section 287(g) Is the Right Answer for State and Local Immigration Enforcement*, HERITAGE FOUNDATION, Executive Memorandum 994, Mar. 2, 2006, at 2, available at [http://www.heritage.org/research/homelandsecurity/upload/94536\\_1.pdf](http://www.heritage.org/research/homelandsecurity/upload/94536_1.pdf).

33. 8 U.S.C. § 1357(g)(3). “In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.” *Id.*

34. 8 U.S.C. § 1357(g)(5) (“With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.”).

make immigration enforcement a greater priority, it seems there is a potential that state interests may be squeezed out by the interests of the federal government. The federal government's immigration enforcement powers may be extended into local communities under the guise that the state or local entity's interests are being addressed. Until 2002, it was unknown how an agreement pursuant to INA section 287(g) would operate.<sup>35</sup> However, the Memorandum of Understanding (MOU) between the State of Florida and the Department of Justice, signed in 2002 and renewed in 2003,<sup>36</sup> is often considered an example of how an INA section 287(g) program may be tailored to address both state and federal concerns.<sup>37</sup>

### III. OVERVIEW OF THE FLORIDA MEMORANDUM OF UNDERSTANDING

#### A. *Purpose Behind the Formulation of the Agreement*

Florida has actively attempted to increase state influence in immigration enforcement before.<sup>38</sup> In 1998, "U.S. Immigration and Naturalization Commissioner Doris Meissner and Florida Governor Lawton Chiles . . . signed the first agreement between the federal government and a state that provide[d] for a joint response to a mass influx of aliens."<sup>39</sup> The 1998 MOU was in recognition of a state need "to develop and implement a comprehensive federal response to any mass influx of aliens within the state."<sup>40</sup> Three years later, the particular needs of the State of Florida changed drastically

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35. See SEGHETTI ET AL., *supra* note 17, at 14–15; News Release, U.S. Dep't of Justice, INS and Florida Sign Historic Agreement on Response to a Mass Migration, (Oct. 19, 1998), available at [http://www.au.af.mil/au/awc/awcgate/migration/florida\\_agreement.htm](http://www.au.af.mil/au/awc/awcgate/migration/florida_agreement.htm) [hereinafter News Release, INS and Florida Sign Historic Agreement].

36. SEGHETTI ET AL., *supra* note 17, at 13, 15.

37. See Carafano, *Section 287(g)*, *supra* note 32, at 2. "A [section] 287(g) pilot program with the State of Florida could serve as a national model. . . . The Florida initiative demonstrates how to craft a program that meets federal as well as state and local needs." *Id.*

38. See News Release, INS and Florida Sign Historic Agreement, *supra* note 35.

39. *Id.* ("The Memorandum of Understanding (MOU) formalizes the terms under which Florida will support INS operations in response to an actual or imminent mass migration into the state. Under the MOU, Florida may provide logistical and law enforcement support to the federal response upon request by INS. INS, as the lead federal agency, will coordinate responsive law enforcement operations, and the state will be reimbursed for authorized expenses incurred. Implementation of the MOU is contingent upon action by the Attorney General to obligate funds from the Immigration Emergency Fund. The Attorney General also can approve the delegation of authority to state law enforcement officers to enforce immigration law during the mass migration.").

40. *Id.*



and so did the nature of its cooperation with the federal government.<sup>41</sup> After September 11, 2001, the State of Florida shared a common understanding with the federal government—that a greater role of the State of Florida in immigration enforcement may have been crucial in preventing the attacks on September 11, 2001.<sup>42</sup> In 2002, the Florida MOU was signed by the Attorney General of the United States, Commissioner of the INS, Governor of Florida, and Commissioner of the Florida Department of Law Enforcement (FDLE).<sup>43</sup> In the year following the September 11th attacks, it is no surprise that the agreement was formulated under the umbrella of domestic security.<sup>44</sup> The limitation in scope to domestic security was built into the agreement by limiting eligible officers to those already working within seven Regional Domestic Security Task Forces (RDSTF).<sup>45</sup> “These task forces have served as the cornerstone of Florida’s domestic security and anti-terrorism efforts since that time . . . .”<sup>46</sup> The RDSTFs, however, often encountered illegal aliens during operations.<sup>47</sup> While attempts were made to involve federal officials with immigration authority, the scarcity of federal resources often

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41. See *The 287(g) Program Hearing*, *supra* note 3, at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law).

42. *Id.* “Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach that encompasses federal, state and local resources, skills and expertise. State and local law enforcement . . . will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety.” U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 1. “[S]everal of the 9/11 hijackers had either entered the United States through Florida or had operated in Florida while preparing for the attack.” *The 287(g) Program Hearing*, *supra* note 3, at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law).

43. Memorandum of Understanding 2002, *supra* note 15, at 9.

44. See *id.* at 1. “The efforts of officers so authorized under this MOU shall remain focused on counter-terrorism and domestic security goals.” *Id.*

45. See *The 287(g) Program Hearing*, *supra* note 3, at 15 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement) (“After the atrocities of September 11, 2001, . . . the state of Florida created seven Regional Domestic Security Task Forces [RDSTFs]. . . . Their mission is to employ the coordinated resources of various local, state and federal agencies to prevent, preempt and disrupt any terrorist attack or other domestic security threats within the state of Florida or in the event of . . . an attack, . . . to effectively respond to the incident to facilitate recovery and investigations.”). “The RDSTF concentrates full-time on domestic security and counter terrorism specific investigative efforts.” *Authority to Enforce Immigration Law Hearing*, *supra* note 1, at 226 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).

46. *The 287(g) Program Hearing*, *supra* note 3, at 17 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

47. *Authority to Enforce Immigration Law Hearing*, *supra* note 1, at 226 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).

frustrated the efforts of the RDSTFs.<sup>48</sup> The FDLE requested greater access to federal immigration databases to aid the RDSTF in their domestic security efforts.<sup>49</sup> This provided an opportunity for the State of Florida to enter into an agreement with little controversy, as the focus was on domestic security rather than increased immigration enforcement.<sup>50</sup>

While the stated intent of the MOU is “to address the counter-terrorism and domestic security needs of the nation and the State of Florida,” the functions listed in the agreement are not specifically limited to instances implicating domestic security concerns.<sup>51</sup> Additionally, limiting the agreement to domestic security and counter-terrorism measures is a unique feature of the Florida agreement and not in any way required by section 287(g).<sup>52</sup> In fact, the agreement authorizes normal immigration functions, including, but not limited to, interrogation of a person believed to be an alien to determine probable cause, completion of arrest reports, preparation of immigration detainers, and even transportation of aliens under arrest.<sup>53</sup> It is also important to note that the agreement supplements already existing duties and authorities of participating officers, rather than limiting them to those set out in the

48. *Id.* “From the very beginning, [the FDLE’s] investigative efforts would encounter alien residents both legal and illegal. Many times it took far too long to get immigration related questions answered, due in some cases to a lack of available federal resources.” *Id.*

49. *See The 287(g) Program Hearing*, *supra* note 3, at 17 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). “The current ICE/RDSTF initiative evolved from a previous FDLE request to allow state law enforcement personnel to have direct access to the Legacy Immigration and Naturalization Service (INS) record systems and databases.” *Id.*

50. *Id.* at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law). “Florida’s initial interest in seeking a Section 287(g) agreement was driven in part by the exigencies of 9/11 and the recognition that state and local law enforcement can increase their effectiveness in the war against terrorism with the addition of Section 287(g) enforcement authority.” *Id.*

51. Memorandum of Understanding 2002, *supra* note 15, at 1, 3. The Florida MOU “specifies that operations conducted jointly by the INS and the state will be limited to missions involving Florida’s Regional Domestic Security Task Force. The agreement, however, fails to clearly delineate what such operations might entail.” *INS and Florida Enter MOU to Allow State Officers to Enforce Immigration Law*, IMMIGRANTS’ RTS. UPDATE (Nat’l Immigration L. Ctr. L.A., Cal.) Sept. 10, 2002, at 4, available at <http://www.nilc.org/immlawpolicy/arrestdet/ad054.htm>.

52. *See* Memorandum of Understanding 2002, *supra* note 15, at 3. “Section 287(g) of the INA allows the DHS and state and local governments to enter into assistance compacts. Both sides must agree on the scope and intent of the program before it is implemented, which gives states and local communities the flexibility to shape the programs to meet their needs.” Carafano, *Section 287(g)*, *supra* note 32, at 2.

53. Memorandum of Understanding 2002, *supra* note 15, at 3; *see* Carafano, *Section 287(g)*, *supra* note 32, at 2.

MOU.<sup>54</sup> Though the participating officers are required to devote substantial time to the Cross-Designation program at the federal agency's discretion, the officers retained their original duties and obligations at the discretion of the employing state agency.<sup>55</sup>

B. *Organization of the Agreement Between the State of Florida and the Department of Justice*

As discussed earlier, agreements under section 287(g) require extensive supervision and discretion by the participating federal agency.<sup>56</sup> Under the Florida MOU, "INS enforcement authority would be delegated to those [participating] officers under Section 287(g) and they would work under the direct supervision of an INS Supervisor and the assigned RDSTF Special Agent Supervisor."<sup>57</sup> According to the structure of the agreement, it is the responsibility of the federal agency to utilize the participating officers only when the purpose of the operation relates to domestic security or counter-terrorism, and the federal agency has the authority to terminate state and local officers' involvement in any operation under the MOU at any time.<sup>58</sup> The limitation in authority granted to participating officers extends beyond the INS' authority under the agreement.<sup>59</sup> In response to expected concerns that participating officers may use their immigration training beyond the stated intent of domestic security and counter-terrorism—and outside the watchful eye of the INS—the agreement provides that "[a]ny such actions . . . shall not

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54. See Memorandum of Understanding 2002, *supra* note 15, at 1.

Nothing herein shall otherwise limit the jurisdiction and powers normally possessed by a participating officer as a member of the officer's employing state or local law enforcement entity (employing entity). Nothing herein shall otherwise limit the ability of participating RDSTF members to provide, as provided by or allowed by law, such assistance in any enforcement action unrelated to RDSTF operations as may be lawfully requested by a law enforcement officer having jurisdiction over any such incident, crime, or matter under consideration.

*Id.*

55. *Id.* at 6. Nothing in this MOU, "limits RDSTF officers or agents who are within their normal territorial jurisdiction(s) from acting unilaterally as officers or agents of their employing entity to engage in continued investigative or enforcement actions as authorized by their employing entity." *Id.*

56. See *id.*

57. *The 287(g) Program Hearing*, *supra* note 3, at 17 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

58. See Memorandum of Understanding 2002, *supra* note 15, at 6.

Participating state and local officers are not to be utilized in routine INS operations unless the operation has a nexus to the RDSTF's domestic security and counter-terrorism function. . . . If at any time the INS officer determines that an INS-related operation should be terminated, all actions related to said operation are to be promptly terminated . . . ."

*Id.*

59. See *id.*

fall within the privileges and obligations of this MOU.”<sup>60</sup> The legislature has acted to limit the exercise of discretion by state officers while working under the agreement.<sup>61</sup>

In addition to being an active member of a RDSTF:

Each nominee has to be a U.S. citizen, have been a sworn officer for a minimum of three years, and have, at minimum, an Associate Degree. Candidates also must be able to qualify for federal security clearances. Once selected, each candidate’s employer has to indicate that it will allow the officer to work a significant portion of his work responsibilities within the RDSTF for a minimum of one year.<sup>62</sup>

These requirements, set out in section V of the MOU, demonstrate an acknowledgement that empowering state and local officials to enforce immigration laws requires special considerations.<sup>63</sup> In order to deal with the complex immigration regime, the agreement requires educated personnel and reduces personnel turnover.<sup>64</sup> These requirements help ensure competence and skill, as well as limit the influx of inexperienced officers.<sup>65</sup>

The design of bringing state and local authorities under the supervision and discretion of the INS is further emphasized in the structure of the training program.<sup>66</sup> Section VI of the MOU explains that the INS will provide both the training materials and establish the curriculum for the participating officers.<sup>67</sup> Soon after implementation of the MOU, “the Immigration Officer Academy crafted a six-week training course featuring the delegation of au-

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60. *See id.* Under the agreement, “[p]articipating state and local officers will have the same qualified immunity as do INS officers from personal liability from tort suits based on actions conducted under this MOU.” *Id.* at 7. The agreement therefore “shift[s] liability to the federal government and provid[es] the officers with additional immunity when enforcing federal laws.” Carafano, *Section 287(g)*, *supra* note 32, at 2. However, even if an officer is not subject to qualified immunity under section X of the MOU, government agents are generally afforded qualified immunity from their actions as long as the officer could believe he was acting within his discretion under the law clearly established at the time. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

61. *See* Memorandum of Understanding 2002, *supra* note 15, at 6.

62. SEGHETTI ET AL., *supra* note 17, at 15.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. Memorandum of Understanding 2002, *supra* note 15, at 4. “Training will include presentations on the pilot project, elements of the MOU, scope of officer authority, cross-cultural issues, use of force policy, civil rights law, liability and issues.” *Id.*

thority curriculum.”<sup>68</sup> “Legacy INS and FDLE, working with law enforcement agencies participating in the RDSTF, finalized the selection of 35 veteran law enforcement investigators as the initial cadre of delegated-authority officers.”<sup>69</sup> “All 35 state and local designees attended [the] six-week intensive training course pursuant to this Memorandum of Understanding in Orlando, Florida during July and August 2002.”<sup>70</sup>

The course covered immigration and nationality law, immigration criminal laws, removal statutes, civil rights, cultural diversity, alien processing, INS structure and record systems and employed the same testing criteria and techniques as basic Immigration Officer Training. On August 15, 2002, the course graduated all 35 participants, who then returned to their assigned RDSTF locations and became operational.<sup>71</sup>

Pursuant to the 2003 renewal of the MOU, training is provided by ICE and “[t]he program uses ICE curriculum and competency testing.”<sup>72</sup> Upon completion of the training program, officers are authorized to perform certain immigration functions with close oversight by the DHS.<sup>73</sup>

The expense of the 287(g) program is borne by both sides of the agreement; the INS is responsible for “training personnel, training materials and supervision.”<sup>74</sup> However, the agreement specifies that the expense of offic-

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68. *The 287(g) Program Hearing*, *supra* note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement); *see also* Envisage, *Case Study: U.S. Immigration Officer Academy*, [http://www.envisagenow.com/resources/case\\_studies/usioa.aspx](http://www.envisagenow.com/resources/case_studies/usioa.aspx) (last visited Nov. 7, 2009) (“The U.S. Immigration Officer Academy (USIOA) operates under the directives of the Department of Justice, Immigration and Naturalization Services. The USIOA provides training to officers in twelve areas of discipline to enforce and maintain the integrity of the immigration laws of the United States. The Academy instructs approximately 3,100 students per year at its Glynco, Georgia training facility.”).

69. *The 287(g) Program Hearing*, *supra* note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

70. *Authority to Enforce Immigration Law Hearing*, *supra* note 1, at 227 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).

71. *The 287(g) Program Hearing*, *supra* note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

72. SEGHETTI ET AL., *supra* note 17, at 15.

73. *Id.* “The officer’s performance is evaluated by the District Director and the FDLE commissioner on a quarterly basis to assure compliance with the [MOU] requirements. Authorization of the officer’s powers could be revoked at any time by DHS, FDLE or the employing agency.” *Id.*

74. Memorandum of Understanding 2002, *supra* note 15, at 5.

ers' participation in training and operations under the MOU is the responsibility of the state and local entities.<sup>75</sup>

#### IV. ANALYSIS OF THE SUCCESSES OF THE FLORIDA AGREEMENT WITHIN THE STATE OF FLORIDA

##### A. *Specific Successes of the Florida Agreement*

The history of the Florida agreement began with the signing of the initial document in July of 2002. After structural reorganization issues were sorted out at both the federal and state levels, the MOU "was renewed and signed by Department of Homeland Security Under Secretary Hutchinson and Florida Governor Bush."<sup>76</sup> The renewal of the MOU after a potential set-back during the reorganization of the executive branch demonstrates the strong desire of both the federal government and the state of Florida to continue cooperative efforts.<sup>77</sup> In April 2005, upon continued support from the

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75. *Id.* at 4. "The FDLE will cover the costs of all candidates' housing and per diem while involved in training required for participation in this pilot project. Costs of travel to and from required training will be the employing entity's responsibility." *Id.* In addition, "[p]articipating RDSTF officers will carry out designated functions at state or local expense, including salaries and benefits, local transportation, and official issue material." *Id.* at 5.

76. *The 287(g) Program Hearing*, *supra* note 3, at 17–18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). On March 1, 2003, "the Immigration and Naturalization Service . . . ceased to exist" and, along with other federal agencies, was absorbed by the Department of Homeland Security under the Homeland Security Act. Francesco Isgio, *After 63 Years in the Department of Justice, INS Ceases to Exist—Its Functions Transfer to New Department of Homeland Security*, IMMIGRATION LITIGATION BULLETIN, 1 (Feb. 28, 2003). ICE (Immigration and Customs Enforcement) "[c]arries out homeland security inspection and investigation[] [functions] formerly handled by [the] INS, Customs Services and Federal Protective Services." *Department of Homeland Security, DEFENSE NEVER RESTS*, July 2003, at 10; *see* U.S. Immigration & Customs Enforcement, About, <http://www.ice.gov/about/index.htm> (last visited Nov. 7, 2009). At the state level, in October, 2003, "the Florida Department of Law Enforcement . . . received a new Executive Director, Commissioner Guy Tunnell." *The 287(g) Program Hearing*, *supra* note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). Due to the creation of the Department of Homeland Security (DHS), section 287(g) now "authorizes the secretary of the U.S. Department of Homeland Security (DHS) to enter into agreements with state and local law enforcement agencies . . . provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) officers." U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 1.

77. *See Authority to Enforce Immigration Law Hearing*, *supra* note 1, at 227–28 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement). "During the months between September and December 2003, no action could be taken by [the] Cross

state and federal governments, “the ICE Academy graduated twenty-seven (27) additional Task Force Agents.”<sup>78</sup> The continuation of the program in Florida is a reflection of the perception by both state and federal agencies that the Florida MOU is effectively addressing immigration concerns within Florida previously beyond the scope of state officers and under the radar of the federal government.

Representing the opinion of the Attorney General was Kris W. Kobach, who claimed that “[t]he success of the [Florida] program was immediately apparent. In the first year under the Florida MOU, the trained state officers made 165 immigration arrests, including the bust of a phony document production ring in the Naples area.”<sup>79</sup> In a hearing on the Florida 287(g) program in 2005, Special Agent Supervisor Mark F. Dubina of the FDLE mentioned that “[t]o date over 100 persons have been arrested, and many more have been interviewed by trained officers who can more adequately determine if a person poses a threat based [on] a number of variables, including knowledge gained by participating in the extensive ICE 287(g) training.”<sup>80</sup> The FDLE, in particular, claims that implementation and renewal of the MOU directly led to various arrests of illegal aliens at sites invoking national security concerns.<sup>81</sup> One concrete example cited by the FDLE is operation “Open Water,” in which “members of the Tampa Bay Regional Domestic Security Task Force . . . arrested several individuals who had obtained port access badges as a result of illegal activity.”<sup>82</sup> The arrests were a result of an

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Designated agents, as the Memorandum of Understanding had not been renewed, and was under review.” *Id.* at 228.

The hiatus experienced in renewing the agreement coupled with the reorganization of INS/ICE threatened to cause this valuable and important program to drift into merely ‘standby’ status—used only when an emergency prompted a need for the use of the specially designated state and local officers. From Florida’s perspective, and indeed from Washington’s, this was not what anyone wanted to occur.

*Id.* at 229.

78. *The 287(g) Program Hearing*, *supra* note 3, at 18–19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

79. *Id.* at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law).

80. *Id.* at 19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

81. *See id.* (“To date, the arrests cover a broad spectrum of activity. We have arrested single individuals involved in what appears to be surveillance activities of sensitive locations. We have also conducted extensive investigations that have resulted in illegal aliens being apprehended working in restricted or secured areas of airports, seaports and nuclear plants.”).

82. News Release, Florida Department of Law Enforcement, TBROC RDSTF Announces Arrests in Operation “Open Water,” (Nov. 16, 2004) [hereinafter News Release, TBROC RDSTF Announces Arrests in Operation “Open Water”] (on file with Nova Law Review).

effort “to investigate instances of identity fraud and false statements used by subjects to obtain employment and access to restricted areas of Florida sea-ports.”<sup>83</sup> The investigation was a joint effort between several state and local entities, including “the U.S. Attorney’s Office (USAO), Florida Department of Law Enforcement Regional Domestic Security Task Force (RDSTF), Social Security Administration (SSA), Department of Homeland Security (DHS), U.S. Immigration & Customs Enforcement (ICE) and the Tampa Port Authority.”<sup>84</sup> It is unquestionable that cooperation by the state and federal entities was paramount in the success of the operation.<sup>85</sup>

The fundamental inquiry is how effective Section 287(g) and the Florida MOU are in combating illegal immigration and serving the needs of Florida and the federal government. In his law review article, Kobach argues that the entire community of local police throughout the nation are needed to combat illegal immigration.<sup>86</sup> However, the Florida MOU only authorizes a select group of state officers to perform certain immigration functions at the discretion of the federal government, hardly the force multiplier discussed by Kobach.<sup>87</sup> Still, analyzing the structure of the Florida MOU in light of the success of operation “Open Water” suggests Florida and the federal government may have formulated an agreement that effectively accomplishes its stated purpose, while striking a balance between greater local involvement in immigration and protection against wide grants of discretion to local law enforcement. The agreement is tailored to domestic security, and though this is an undefined and ambiguous term, the officers involved are solely within the RDSTFs, which only conduct operations implicating domestic security.<sup>88</sup>

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83. *Id.*

84. *Id.*

85. *See id.* (“A comprehensive list with biographical information of port access badge holders was obtained from the FDLE Applicant Services Section. From that list, biographical information relative to name, date of birth, Social Security number and other identifying features was compared to SSA, ICE and FDLE records in an effort to identify which subjects provided false information to receive port access badges. The screening identified potential suspects that provided inconsistent or false information during the application and security background process. These subjects were then [sic] further examined and the cases were presented to a Federal Grand Jury.”).

86. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005).

87. *See* U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 2.

88. *See* News Release, TBROC RDSTF Announces Arrest in Operation “Open Water,” *supra* note 82.



In his article, Kris Kobach cites an example demonstrating how local enforcement of immigration laws is vital to domestic security.<sup>89</sup> In his example,

a police officer learns that a university student from a country that is a state sponsor of terrorism has made several purchases of significant quantities of fertilizer. He may also learn from other university students that the individual has not been attending classes. Neither of these actions constitutes a crime. However, from these circumstances, the officer may reasonably suspect that the alien has violated the terms of his student visa.<sup>90</sup>

This is certainly an example of how local officers may assist in addressing domestic security concerns that would ordinarily fly under the radar of the federal government. What this example does not address, however, is the concern of how local officers can operate within the pervasive regulatory scheme identified in *Gonzales* without access to the requisite training and federal databases.<sup>91</sup> This concern is addressed by Section 287(g) and the Florida MOU; and Operation “Open Water” is an example of their effectiveness. In that operation, state officers identified the suspicious characters, and obtained the necessary biographical information to identify potential domestic security threats.<sup>92</sup> The officers then referenced both state and federal databases in an effort to determine which suspects had “provided false information to receive port access badges.”<sup>93</sup> It is unclear whether the state officers would have had access to either the Social Security Administration (SSA) or the U.S. Immigration & Customs Enforcement (ICE) databases without cross-agency cooperation. Essentially, Operation “Open Water” demonstrates how the Florida MOU closed gaps between the investigative spheres of the state and federal law enforcement agencies, providing an opportunity to conduct targeted domestic security operations previously unachievable.<sup>94</sup>

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89. Kobach, *supra* note 86, at 189.

90. *Id.* at 189–90 (footnote omitted).

91. See *Gonzales v. City of Peoria*, 722 F.2d 468, 474–75 (9th Cir. 1983).

92. FLA. DEP’T OF LAW ENFORCEMENT, QUARTERLY PERFORMANCE REPORT, OPERATION “OPEN WATER” NETS 15 ARRESTS AT TAMPA PORT (2004–05), available at [http://www.fdle.state.fl.us/Content/getdoc/402a16e9-7c21-409d-93ea-3ef3c435a318/FDLE\\_Cabinet\\_Package\\_041905.aspx](http://www.fdle.state.fl.us/Content/getdoc/402a16e9-7c21-409d-93ea-3ef3c435a318/FDLE_Cabinet_Package_041905.aspx).

93. *Id.*

94. See *The 287(g) Program Hearing*, *supra* note 3, at 18–19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). Operation “Open Water” “was successful because it combined the efforts of a number of FDLE programs/initiatives and the training and expertise of the ICE 287(g) trained Agents and the ICE Lead Worker assigned to the RDSTF.” *Id.* at 19.

Florida had the intention of designing a limited program, by which state law enforcement could assist the federal government in addressing immigration violations related to domestic security concerns that would have ordinarily been outside the investigative authority of the state and under the radar of the federal government. The Florida MOU, the first agreement of its kind formulated under Section 287(g) of the INA, seems to have accomplished that goal. Nevertheless, the program does provide for greater local involvement in immigration enforcement. Anytime there is a wider local involvement in immigration enforcement, concerns of civil rights and community relations must be addressed.

## V. CONTROVERSIAL ISSUES REGARDING INCREASED LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION VIOLATIONS

### A. *Civil Rights Concerns*

Civil rights concerns are a big factor when discussing local enforcement of federal immigration law. The American Civil Liberties Union (ACLU) has commented that “[i]nvolving state and local law enforcement in immigration status issues would have a severe impact on the civil rights and civil liberties of all persons, citizens and non-citizens alike, who reside in communities with large immigrant populations.”<sup>95</sup> It is important to understand how the empowerment of local law enforcement could implicate civil rights concerns, and how the Florida MOU addresses these common concerns.

Empowering local law enforcement to investigate and arrest for civil immigration violations creates an avenue by which minority groups may be subject to harassment.<sup>96</sup> Pretextual stops by police with the intention to investigate immigration status may have drastic consequences for both illegal immigrants as well as legal minorities who are unable to provide proof of citizenship.<sup>97</sup> Local law enforcement simply does not have the resources or training to properly investigate citizenship status without illegally subjecting citizens and legal immigrants to illegal investigations.<sup>98</sup>

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95. *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR ACT): Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. 108 (2003) [hereinafter *Hearing on H.R. 2671*] (statement of Timothy H. Edgar, Legislative Counsel, ACLU).

96. See SEGHETTI ET AL., *supra* note 17, at 20.

97. See *id.*

98. See *id.* (“Because unauthorized aliens are likely to be members of minority groups, complications may arise in enforcing immigration law due to the difficulty in identifying illegal aliens while at the same time avoiding the appearance of discrimination based on ethnicity or alienage. Thus, a high risk for civil rights violations may occur if state and local

The Florida MOU does not seem to implicate these common civil rights concerns due to its narrow scope and implementation. It has even been suggested that the Florida MOU alleviates some of the civil rights problems associated with greater local enforcement of immigration violations and actually benefit immigrants in that respect.<sup>99</sup> There is some substance to this argument simply based on the training and access to information that is available to the participating state officers. However, it is difficult to see how greater training and information can benefit immigrants who remain in targeted ethnic communities. Simply acknowledging that this program may lead to shorter immigration related detentions of innocent individuals who are members of certain ethnic communities is an acknowledgment that racial profiling does occur in immigration enforcement.<sup>100</sup> A better way to understand the civil rights implications is to accept that empowering local law enforcement to enforce civil immigration violations will inherently have an element of racial profiling as a means of investigation and enforcement. The Florida agreement, however, only empowers a relatively small amount of state and local officials to engage in these enforcement practices and is fairly limited to the realm of domestic security and under the supervision of the federal government.<sup>101</sup> The amount of oversight required by Section 287(g) and the Florida MOU, along with the narrowly tailored enforcement powers of the participating state and local officers, substantially decreases the likelihood of participating officers engaging in activities that threatens the civil rights of minority communities.

### B. *Strained Relationships with Minority Communities*

While citizens and legal immigrants worry about the potential civil rights abuses stemming from local enforcement of immigration violations,

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police do not obtain the requisite knowledge, training, and experience in dealing with the enforcement of immigration laws.”).

99. *The 287(g) Program Hearing*, *supra* note 3, at 19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement) (“In those cases where an immigrant is cleared of suspicion, but still has immigration issues, the subject is afforded the same consideration as an illegal alien not encountered under these circumstances.” “Ironically, this training and experience has proven to be a benefit to the immigrant communities because the Agents are more readily able to clear a person that is suspected of suspicious activity by having access to the wealth of information contained in ICE databases.”).

100. See SEGHETTI ET AL., *supra* note 17, at 20. “[S]uspects of immigration violations may become victims of ‘racial profiling’—the practice of targeting individuals for police or security detention based on their race or ethnicity in the belief that certain minority groups are more likely to engage in unlawful behavior or be present in the United States illegally.” *Id.*

101. Memorandum of Understanding 2002, *supra* note 15, at 1.

law enforcement entities worry about a resulting strain on community relations.<sup>102</sup> The ACLU, an opponent to greater local enforcement of immigration violations, explains that involvement in enforcement of immigration violations “is opposed by many police departments and local governments who fear it would undermine public safety.”<sup>103</sup> The main priority of local police is crime control and maintenance of law and order within their district.<sup>104</sup> Empowering local officers to enforce immigration laws encourages minority citizens and illegal aliens to retreat from the police, essentially discouraging the reporting of crimes and cooperation with local police officers.<sup>105</sup> Florida officials have consistently acknowledged this concern.<sup>106</sup> During the training period of the initial MOU in 2002,

the State of Florida, through the RSDTF’s, expended considerable energy and time communicating the purpose of the program to various ethnic groups. . . . Some cultural groups expressed concerns related to any INS authority being delegated to state and local officers. The Office of the Governor, the RSDTF’s, and Legacy INS diligently worked to communicate exactly what Florida’s intentions were with this program to the ethnic groups with concerns, including community and religious leaders representing Hispanics, Haitians and persons from countries in the Middle East. All participating agencies collaborated on, and later produced, an informative brochure that explained in simple terms, and multiple languages, the mission of the program. Additionally, we did not miss an opportunity to communicate our message via the print, radio and television media.<sup>107</sup>

The FDLE has ensured that no activity has occurred which should concern local immigrants, regardless of their status.<sup>108</sup>

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102. *Hearing on H.R. 2671, supra* note 95, at 108.

103. *Id.*

104. *See id.* at 108–09.

105. SEGHETTI ET AL., *supra* note 17, at 21.

[U]tilizing state and local law enforcement to enforce immigration law would undermine the relationship between local law enforcement agencies and the communities they serve. For example, potential witnesses and victims of crime may be reluctant to come forward to report crimes in fear of actions that might be taken against them by immigration officials.

*Id.*

106. *See The 287(g) Program Hearing, supra* note 3, at 17–18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

107. *Id.* at 18.

108. *See id.* at 18. “Within this program there have been no examples where persons have been arrested or detained that were not directly related to a domestic security complaint or focused investigation.” *Id.*

Again, the structure of the Florida MOU should ease concerns that immigrants may have in interacting with law enforcement. Only a handful of officers are empowered to enforce certain civil immigration violations and only under the discretion of the overseeing federal agency.<sup>109</sup> The main reason that citizens need not fear this program is that the officers within the RDSTFs are not engaged in day-to-day law enforcement activity.<sup>110</sup> Proponents of greater local enforcement of immigration may wish that the Florida agreement provided for broader grants of authority to a wider segment of Florida state law enforcement, but it is this limit on the program's scope that should ease immigrants' fears of looming mass deportation.

#### VI. EXAMINATION OF THE PROPER WAY TO PROCEED WITH AN EXPANSION OF 287(G) PROGRAMS THROUGHOUT THE UNITED STATES

Taking into account the concerns regarding local enforcement of immigration laws as well as the actual effectiveness of programs designed to increase local participation in enforcement of civil violations of the INA, the Florida MOU seems to be a model for the structuring and implementation of future agreements.<sup>111</sup> Shortly after Florida became the first state to utilize INA Section 287(g), the trend of expanding 287(g) programs into other states began.<sup>112</sup> "In November 2003, ICE and the Alabama Department of Public Safety (ALDPS) signed an MOU to provide immigration authority to 21 Alabama state troopers."<sup>113</sup> The Alabama MOU was structured in a similar fashion as the Florida MOU, mainly due to the limitations required by Sec-

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[W]hile significant concerns were expressed particularly by groups representing seasonal workers at the duration of our Cross Designation project, we have stuck to the spirit and letter of our Memorandum of Understanding. There have been no situations where fields have been raided, labor camps infiltrated, nor would such be tolerated.

*Authority to Enforce Immigration Law Hearing*, *supra* note 1, at 228 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).

109. See Memorandum of Understanding 2002, *supra* note 15, at 5–6.

110. See *id.* at 6. The responsibilities of the Task Force will include:

improving Florida's ability to detect and prevent potential terrorist threats; collecting and disseminating intelligence and investigative information; facilitating and promoting ongoing security audits and vulnerability assessments to protect critical infrastructures; coordinating the delivery of training and supporting the purchase of proper equipment for public safety first responders and [disaster] response teams; improving Florida's response and recovery capabilities; [and promoting better public awareness of how suspicious incidents may be reported]; and facilitating initial response to terrorist incidences within each region.

FLORIDA FIRE CHIEFS' ASSOCIATION, REGIONAL DOMESTIC SECURITY TASK FORCE—DRSC PLAN 1, available at <http://www.ffca.org/files/public/DSRC10-02.pdf>.

111. See U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 2.

112. See *id.*

113. *Id.*

tion 287(g).<sup>114</sup> However, the Alabama MOU is not limited to instances of domestic security like the Florida MOU, a key limitation in the Florida agreements' scope.<sup>115</sup> Alabama's desire was to design a program that allowed for state law enforcement officers to assist in general identification and removal of illegal aliens.<sup>116</sup> Under the program, Alabama's officers "received extensive training in immigration and nationality law and procedures and now have the authority to determine whether or not an individual is an illegal alien and can be removed from the U.S. in addition to their normal duties."<sup>117</sup> In describing the limitation in scope of the Alabama agreement beyond those enumerated in Section 287(g), Col. Mike Coppage, then Director of the Alabama Department of Public Safety, stated that "the troopers will engage in immigration enforcement actions only as needed during the course of their regular duties."<sup>118</sup> This was followed by a promise that "[t]hese are state troopers, not immigration agents . . . and they will not take part in 'sweep' searches for illegal aliens."<sup>119</sup> This trend has been seen in other states as well, including Virginia, where an agreement "allow[ed] specially trained state police officers to make arrests for immi-

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114. SEGHETTI ET AL., *supra* note 17, at 16 (recognizing that under the Alabama MOU, "[t]raining is provided by ICE, and the curriculum is the same as provided in Florida's [MOU].")

Immigration enforcement activities of the officers will be supervised and directed by ICE special agents, who are located in Huntsville, Birmingham and Montgomery, Alabama. Such activities can only be performed under direct supervision of ICE special agents. Arrests made under the authority must be reported to ICE within 24 hours, and will be reviewed by the ICE special agent on an ongoing basis to ensure compliance with immigration laws and procedures.

*Id.*

115. *See id.* at 15–16.

116. *The 287(g) Program Hearing*, *supra* note 3, at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law) ("Alabama had experienced widespread and increasing violations of federal immigration law by aliens in its jurisdiction. However, the distribution of INS manpower left Alabama underserved, in the judgment of Alabama's law enforcement leadership and members of its congressional delegation. At times, as few as three INS interior enforcement agents were operating in the state. Recognizing that breakdown of the rule of law in immigration carries with it attendant public safety threats, Alabama addressed the INS manpower shortage by committing its own officers to the task.").

117. U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 2.

118. News Release, Ala. Dep't of Pub. Safety, Alabama Implements Agreement with U.S. Immigration and Customs Enforcement (Oct. 3, 2003), *available at* <http://dps.alabama.gov/appDocuments/Documents/News%20Release/10-03-03-ICEGraduation.pdf> [hereinafter News Release, Ala. Dep't of Pub. Safety].

119. *Id.*

gration violations.”<sup>120</sup> “Virginia officials decided to seek extra immigration powers for some state police officers after participating in local and federal task forces on terrorism and gang violence.”<sup>121</sup> These programs, similar to the Florida MOU, empower relatively small amounts of state officers to perform certain immigration functions.<sup>122</sup>

Another example of an agreement being narrowly tailored to address a specific state need is the agreement with the Mecklenburg County Sheriff’s Office in Charlotte, North Carolina, entered into in February 2006.<sup>123</sup> In that agreement, the Mecklenburg County Sheriff’s Office desired a limited presence in the county prison system to investigate the immigration status of those already involved in the justice system.<sup>124</sup> This is just another example of the wide variety of issues that can be addressed with INA 287(g) cooperation.<sup>125</sup>

An issue in need of discussion is the scope of these additional agreements. For example, the Alabama program is unquestionably broader than the Florida program in that it is not narrowly tailored to instances involving domestic security or any other specific area of law enforcement.<sup>126</sup> Instead, it supplements the participating officers’ existing duties with the authority to

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120. *Third State to Get Power to Enforce Immigration Laws*, 9–10 BENDER’S IMMIGR. BULL. 4 (2004). Col. Steven Flaherty, superintendent of Virginia’s state police at the time, explained that

[u]nder the agreement . . . about 50 Virginia state police officers would be able to enforce federal immigration law in addition to their other responsibilities . . . . The officers would be stationed throughout the state, with one attached to each of the 24 drug task forces in Virginia . . . . They would be under the supervision of federal authorities when carrying out immigration enforcement.

Mary Beth Sheridan, *Va. Seeks New Role Against Illegals; Police to Enforce Immigration Law*, WASH. POST, Apr. 24, 2004, at A1.

121. Sheridan, *supra* note 120.

122. See News Release, Ala. Dep’t of Pub. Safety, *supra* note 118.

123. *Empowering Local Law Enforcement to Combat Illegal Immigration: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the Comm. on Gov’t Reform*, 109th Cong. 16 (2006) (statement of Kenneth A. Smith, Special Agent, ICE).

124. See *id.*

ICE said it will train 10 deputies to carry out certain duties traditionally handled by federal immigration officers. The Mecklenburg County Sheriff’s Office deputies will operate within the Mecklenburg County Jail facilities to interview foreign national inmates to determine whether there is probable cause for an immigration violation; complete the processing for criminal aliens, including fingerprinting; prepare documentation to place aliens in deportation proceedings concurrent with their prison term; and prepare documentation to deport aliens following their terms.

*Program Federalizes Deputies to Process Illegal Aliens*, WSOC-TV.COM, Feb. 6, 2006, <http://www.wsoc-tv.com/news/6784297/detail.html>.

125. See News Release, Ala. Dep’t of Pub. Safety, *supra* note 118.

126. See SEGHELLI ET AL., *supra* note 17, at 15–16.

perform certain immigration enforcement functions.<sup>127</sup> Nevertheless, given the relatively small amount of officers trained under the programs and the extensive oversight of the federal government required by section 287(g), the probability of civil rights abuses or extensive strains of community relations is minimal.<sup>128</sup> According to the Department of Homeland Security, only “159 officers within seven distinct law enforcement agencies in five States” had been trained by ICE under 287(g) agreements by August 25, 2006.<sup>129</sup> This relatively small number is a balancing factor against any abuses that may arise out of these agreements.<sup>130</sup> The question for the future, however, is the extent that the federal government should expand the use of INA Section 287(g) programs to address illegal immigration issues throughout the nation.

## VII. EXPANSION OF 287(G) PROGRAMS AND ICE ACCESS

### A. ICE ACCESS

After the initial implementation of 287(g), cross-designation programs were slow to be implemented.<sup>131</sup> But what began as isolated agreements to meet specific state or local needs eventually developed into a broader desire of state and local entities to address the hot political issue of immigration enforcement.<sup>132</sup> ICE set out to make cross-designation programs more accessible to the growing number of communities expressing interest.<sup>133</sup>

On August 21, 2007, ICE announced a new program designated ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security).<sup>134</sup> The program was developed in response to “the widespread interest from local law enforcement agencies that have requested ICE partnerships through the 287(g) program.”<sup>135</sup> ICE explains that ICE ACCESS

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127. *See id.* at 16.

128. *See Empowering Local Law Enforcement*, *supra* note 123, at 21–22 (statement of Kenneth A. Smith, Special Agent, ICE). Since its inception in which twenty-one Alabama troops were trained under the agreement, only “an additional 27 troopers have been trained and certified.” *Id.*

129. *Id.* at 16.

130. *See id.*

131. *See* U.S. Immigration & Customs Enforcement, ICE ACCESS, <http://www.ice.gov/partners/dro/iceaccess.htm> (last visited Nov. 7, 2009).

132. *See id.*

133. *See id.*

134. News Release, U.S. Immigration & Customs Enforcement, New ICE ACCESS Program Highlights Various Law Enforcement Partnerships (Aug. 21, 2007), *available at*, <http://www.ice.gov/pi/news/newsreleases/articles/070821dc.htm>.

135. *Id.*



stems from the success of cross-designation programs, as well as the overwhelming increase in interest of state and local officials in entering into co-operative agreements with ICE.<sup>136</sup> But the new ICE ACCESS program is more than a means to contract with local agencies under INA 287(g).<sup>137</sup> Instead, 287(g) is but “one component under the ICE ACCESS umbrella of services,” which includes various other programs related to immigration enforcement.<sup>138</sup> For example, under the Document and Benefit Fraud Task Forces, local agencies may partner with ICE in ferreting out document fraud within their jurisdictions.<sup>139</sup> This one program has already been implemented in seventeen cities around the country.<sup>140</sup> It is clear that ICE is building on the framework established by 287(g) to partner with various law enforcement agencies to address a variety of immigration-related tasks.<sup>141</sup> Unlike the Florida Memorandum of Understanding, these immigration-related tasks are not limited to domestic security concerns, but span the realm of immigration related functions.<sup>142</sup> But much like agreements under 287(g) only a few years ago, it is still too early to gauge the impact of these programs both on the crimes they address, and on the communities in which they operate.

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136. *Id.* “In the past two years, the 287(g) program has identified more than 22,000 illegal aliens for possible deportation. More than 60 municipal, county, and state agencies nationwide have requested 287(g) MOAs with ICE and more than 400 local and state officers have been trained under the program.” *Id.*

137. *See* U.S. Immigration & Enforcement, ICE ACCESS, *supra* note 131.

138. *Id.* These programs include Asset Forfeiture, Border Enforcement Security Task Forces (BEST), Criminal Alien Program (CAP), Customs Cross-designation (Title 19), Document and Benefit Fraud Task Forces, Equitable Sharing/Joint Operations, Fugitive Operation Teams (FOTs), Immigration Cross-designation (Title 8)—287(g) Program, IPR Center (Intellectual Rights Property Center), Law Enforcement Support Center (LESC), Operation Community Shield, Operation Firewall, and Operation Predator. *Id.*

139. *Id.* (“ICE created Document and Benefit Fraud Task Forces (DBFTFs) to target, dismantle and seize illicit proceeds of the criminal organizations that threaten national security and public safety by exploiting the immigration process through fraud. The DBFTFs provide an effective platform from which to launch anti-fraud initiatives using existing manpower and authorities. Through DBFTFs ICE partners with other federal agencies, state and local law enforcement. These task forces focus their efforts on detecting, deterring and disrupting both benefit fraud and document fraud.”). *Id.*

140. U.S. Immigration & Enforcement, ICE ACCESS, *supra* note 131. DBFTFs are located in “Atlanta, Boston, Dallas, Denver, Detroit, Los Angeles, New York, Newark, Philadelphia, St. Paul, . . . Washington D.C., . . . Baltimore, Chicago, Miami, Phoenix, San Francisco, and Tampa.” *Id.*

141. *See id.*

142. *See* Memorandum of Understanding 2002, *supra* note 15, at 5.

### B. *Adoption of ICE ACCESS Programs*

ICE ACCESS has proven to be a useful tool for the national spread of 287(g) training programs, as the program has drawn interest from a wide spectrum of local governments and law enforcement agencies.<sup>143</sup> In just one five-week session in January 2008, thirty-seven officers from five different states and eight different law enforcement agencies received training under the 287(g) component of ICE ACCESS.<sup>144</sup> At the same time, another four-week program offered 287(g) training to thirty-six officers from five different law enforcement agencies in Maryland and Virginia.<sup>145</sup>

In fact, as of August 18, 2008, ICE had entered into Memorandums of Agreement with sixty-three separate law enforcement agencies, spanning across the entire country.<sup>146</sup> Throughout these agencies, more than 840 officers have received training, and ICE claims that more than 70,000 individuals have been identified for possible immigration violations pursuant to section 287(g) authority.<sup>147</sup> These programs are vastly different from the original section 287(g) Memorandum of Understanding between ICE and the Florida Department of Law Enforcement, which was limited specifically to domestic security.<sup>148</sup> While ICE notes that the purpose of section 287(g) programs is to combat “[t]errorism and criminal activity . . . through a multi-agency/multi-authority approach,” it is clear that these programs are actually

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143. News Release, U.S. Immigration & Customs Enforcement, ICE Begins Immigration Training for Georgia Sheriffs’ Offices and Others (Jan. 8, 2008), *available at* <http://www.ice.gov/pi/news/newsreleases/articles/080108hallcounty.htm>.

144. *Id.* The agencies included:

Hall County Sheriff’s Office (GA)—9 officers; Whitfield County Sheriff’s Office (GA)—6 officers; Butler County Sheriff’s Office (OH)—8 officers; Durham Police Department (NC)—1 officer; Cabarrus County Sheriff’s Office (NC)—5 officers; Colorado State Patrol—2 officers; El Paso County Sheriff’s Office (CO)—5 officers; [and] Florida Department of Law Enforcement—1 officer.

*Id.*

145. News Release, U.S. Immigration & Customs Enforcement, ICE Begins Immigration Training for Maryland and Virginia Officers (Feb. 4, 2008), *available at* <http://www.ice.gov/pi/news/newsreleases/articles/080204federickcounty.htm> [hereinafter News Release, ICE Begins Immigration Training for Maryland and Virginia Officers]. The agencies included “Frederick County Sheriff’s Office (MD)—26 deputies; Manassas Police Department (VA)—1 officer; Manassas Park Police Department (VA)—1 officer; Prince William County Police Department (VA)—6 officers; [and] Prince William County Sheriff’s Office (VA)—2 deputies.” *Id.*

146. Programs, U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act (Aug. 18, 2008), *available at* [http://www.ice.gov/partners/287g/section287\\_g.htm?searchstring=287g](http://www.ice.gov/partners/287g/section287_g.htm?searchstring=287g).

147. *Id.*

148. *See id.*; *see also* Memorandum of Understanding 2002, *supra* note 15, at 1.

less related to specifically combating terrorism, and more geared towards criminal investigation.<sup>149</sup>

This shift to a generalized immigration enforcement function at the local level can be seen in Frederick County, Maryland, where twenty-six Sheriff's deputies "receiv[ed] training that will enable them to start deportation for [illegal] immigrants who . . . have been apprehended for committing a crime."<sup>150</sup> Of the twenty-six officers trained, sixteen consist of correctional officers who work in the Frederick County Adult Detention Center, similar to the officers from the Mecklenburg County Sheriff's Office in Charlotte, North Carolina.<sup>151</sup> But the other ten officers are sworn deputies intermingled within various units of the department, including narcotics, criminal investigation, the Community Response Team, and even the patrol unit.<sup>152</sup> Sheriff Chuck Jenkins, in attempting to assure that the program would be limited in scope, gave the following example of when an immigration investigation might be triggered: "If a driver is stopped for speeding and unable to present identification or possesses a fake ID, an immigration check could be triggered."<sup>153</sup> Sheriff Jenkins seems to misunderstand the concerns that immigrants have for such a program. In assuring that the program would not lead to round-ups of immigrants, Sheriff Jenkins explained that the trained officers "won't all be in a white van driving up and down the streets looking for people to pick up."<sup>154</sup> This simplistic understating of the fear held by immigrant populations threatens to increase the divide between the immigrant community and local law enforcement.<sup>155</sup> The threat of immigration investigations pursuant to ordinary traffic stops is exactly the type of conduct that immigrants, both legal and illegal, are concerned about.<sup>156</sup>

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149. Programs, U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, *supra* note 146.

150. Don Kornreich, *There's a New Sheriff in Town, and He's Dealing with Criminal Illegal Immigrants*, FREDERICK NEWS POST (Md.), Feb. 24, 2008, available at [http://www.fredericknewspost.com/sections/archives/display\\_detail.htm?StoryID=79466](http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=79466); see News Release, ICE Begins Immigration Training for Maryland and Virginia Officers, *supra* note 146.

151. Marge Neal, *Jenkins Defends Immigration Program*, FREDERICK NEWS POST (Md.) Feb. 8, 2008, available at [http://www.fredericknewspost.com/sections/archives/display\\_detail.htm?StoryID=78614](http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=78614); see also *Empowering Local Law Enforcement*, *supra* note 123, at 16 (statement of Kenneth A. Smith, Special Agent, ICE).

152. Neal, *supra* note 151.

153. *Id.*

154. *Id.*

155. *See id.*

156. *See id.*

### C. *Response to ICE ACCESS in Danbury, Connecticut*

Danbury is a city in Fairfield County, Connecticut, of about 90,000 residents.<sup>157</sup> The city, however, is known to have an actual population of about 80,000 legal residents.<sup>158</sup> “At least 10,000 illegal immigrants . . . are estimated to reside in Danbury . . . .”<sup>159</sup> What makes Danbury even more interesting in the national immigration debate is the fact that “Danbury has a greater proportion of foreign-born residents than any other city in Connecticut, [constituting] 34 percent of the population.”<sup>160</sup> This sets the backdrop for one of the more interesting immigration cases on the national scene today, where a government is determined to begin cooperation with federal immigration authorities, and a wary public awaits the implementation of the program with skepticism and fear.<sup>161</sup>

In 2004, Mark Boughton, Mayor of Danbury, began actively pursuing immigration reform on both the national and local level.<sup>162</sup> Mayor Boughton expressed concern that the federal government was not enforcing immigration regulations, and, by letter to the Director of the U.S. Citizenship and Immigration Services, specifically requested greater focus on enforcement in Danbury.<sup>163</sup> The following year, Mayor Boughton requested that Attorney General Richard Blumenthal negotiate an agreement with the federal government “to increase enforcement of immigration laws.”<sup>164</sup> The implementation of ICE ACCESS provided an opportunity for Mayor Boughton’s vision of immigration enforcement to be realized.<sup>165</sup> On September 13, 2007, the Danbury Common Council informed the Mayor of the ICE ACCESS program and requested that he contact the Chief of Police to study the feasibility

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157. See Thomas Kaplan, *Danbury Council Vote on Policing Immigrant Community Draws Thousands to Protest*, N.Y. TIMES, Feb. 7, 2008, at B3.

158. *Id.*

159. *Id.*

160. Jill P. Capuzzo, *Connecticut City Plans to Team Its Police with Federal Immigration Agents*, N.Y. TIMES, Feb. 6, 2008, at B1.

161. See *id.*

162. See Press Release, Michael McLachlan, Mayor Boughton Calls on Immigration Service to Increase Enforcement in Danbury (Dec. 17, 2004), <http://www.ci.danbury.ct.us/content/39/75/2732/2481.aspx>.

163. *Id.*

164. Press Release, Michael McLachlan, Mayor Requests State Police be Deputized as Immigration Agents (Apr. 15, 2005), <http://www.ci.danbury.ct.us/content/39/75/2732/3186.aspx>.

165. See Letter from Common Council, City of Danbury, to Mark D. Boughton, Mayor of Danbury, (Sept. 13, 2007), available at <http://www.ci.danbury.ct.us/filestorage/45/464/1108/7386/10776/08.pdf>.

of such an agreement.<sup>166</sup> Within two months, both the Deputy Corporation Counsel of Danbury and Chief of Police Alan Baker were advocating for a cooperative agreement under the ICE ACCESS program.<sup>167</sup> A few days later, Mayor Boughton endorsed the ICE ACCESS program, and the process began to implement such an agreement.<sup>168</sup> On February 7, 2008, the Common Council voted 19 to 2 to approve a plan for cooperation with ICE, allowing Police Chief Baker to enter into a training agreement.<sup>169</sup>

Not all Danbury residents were happy to see these events unfold. On the same night as the Council's vote, thousands of protesters picketed near City Hall.<sup>170</sup> "Opponents of the plan said it would inspire racial profiling and damage the trust between the large immigrant community [in Danbury] and the authorities."<sup>171</sup> While the Mayor, Police Chief, and council members have all reassured Danbury residents that the agreement would not lead to "sweeps" in local communities,<sup>172</sup> residents may nevertheless have reason to be skeptical. In an effort to ease fears about a formal agreement, Police Chief Baker has insisted that the agreement would be a mere formalization of a long-standing relationship with ICE.<sup>173</sup> In a similar respect, Deputy Corporation Counsel Laszlo L. Pinter has stated that the ICE ACCESS programs do not "provide for the unbridled arrest or detention of individuals involved in day labor, housing violations or related non criminal activity."<sup>174</sup> But

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166. *Id.*

167. Memorandum from Laszlo L. Pinter, Deputy Corp. Counsel, City of Danbury, on the ICE ACCESS Program to the Honorable Mayor Mark D. Boughton and the Honorable Members of the Common Council (Dec. 18, 2007), *available at* <http://www.ci.danbury.ct.us/filestorage/45/464/1108/11692/11732/19B.pdf> [hereinafter Memorandum from Laszlo L. Pinter]; Memorandum from Alan D. Baker to Mayor Mark D. Boughton (Dec. 20, 2007), *available at* <http://www.ci.danbury.ct.us/filestorage/45/464/1108/11692/11732/19C.pdf> [hereinafter Memorandum from Alan D. Baker].

168. *See* City of Danbury, Conn., Minutes of the Common Council Committee of the Whole (Jan. 14, 2008), *available at* <http://www.ci.danbury.ct.us/filestorage/45/464/1108/11692/12089/29>.

169. Kaplan, *supra* note 157.

170. *Id.*

171. *Id.*

172. *See id.* Danbury residents were reassured by Councilman Benjamin Chianese, "[t]here aren't going to be sweeps," but rather "'there is going to be mutual trust in this community.'" *Id.* Police Chief Alan Baker has met with representatives of the immigrant community, explaining that working with ICE does not mean "the mass roundup of people who look like 'immigrants,' as predicted by the activists on both sides." News-Times Staff, *ICE, NEWS-TIMES* (Ct.), Feb. 27, 2008. Mayor Boughton has also reassured the community, expressing that "[b]oth sides think there will be sweeps. It's not going to happen." Eugene Driscoll, *ICE Dominates Danbury Forum*, *NEWS-TIMES* (Ct.), Feb. 28, 2008.

173. *See* Memorandum from Alan D. Baker, *supra* note 167.

174. Memorandum from Laszlo L. Pinter, *supra* note 167.

many residents doubt the true motives behind the plan to formalize a relationship with ICE.<sup>175</sup> They point to an incident from September 2006, where eleven illegal immigrants were approached by law enforcement in a city park, offered jobs, and “when the workers followed, they were arrested.”<sup>176</sup> One year later, nine of the day laborers filed a federal lawsuit challenging the legality of the sting operation, claiming that the arrests were a result of racial profiling and that they were illegally detained for immigration violations by Danbury police officers.<sup>177</sup> The lawsuit further clarified that none of the officers involved in the operation were searching for a fugitive, and there was no evidence of illegal entry into the country by any of the individuals.<sup>178</sup> Mayor Boughton defended the operation, claiming that “local police had only provided ‘logistical support’ to federal immigration agents during the operation.”<sup>179</sup> Nevertheless, residents remain skeptical, and continue to protest the formalization of the relationship with ICE.<sup>180</sup>

Danbury officials have maintained that the program will be of limited scope.<sup>181</sup> Officers will participate in the enforcement of several specific “crimes committed by illegal immigrants.”<sup>182</sup> But a simple notation of crimes which will be targeted by local officials does not effectively limit the scope of discretion and authority exercised by the officers.<sup>183</sup> This was recognized by Danbury Council Member Paul Rotello who called for further discussion regarding the grant of authority before voting on approving a plan.<sup>184</sup> Rotello argued that the information provided to the Council did not

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175. See Kaplan, *supra* note 157.

176. *Id.*

177. Nina Bernstein, *Challenge in Connecticut Over Immigrants’ Arrest*, N.Y. TIMES, Sept. 26, 2007, at B1.

According to the complaint, on Sept. 19, 2006, a Danbury police officer posing as a contractor drove an unmarked van belonging to the federal Immigration and Customs Enforcement agency to a park in downtown Danbury where day laborers, many from Ecuador, gather. Pretending to offer \$11 an hour to demolish a fence, the officer transported 11 would-be workers to a fenced-in lot where they were arrested, handed over to federal immigration agents and eventually placed in deportation proceedings.

*Id.*

178. *Id.*

179. *Id.*

180. Kaplan, *supra* note 157.

181. See Memorandum from Alan D. Baker, *supra* note 167.

182. *Id.* (stating that these crimes included, but were not limited to, “gangs [and] organized crime, drug smuggling, human trafficking, document fraud, identity and benefit theft, [and] work site investigation”).

183. See Eugene Driscoll, *Rotello Wants Details on ICE: Councilman Sent Plan to Committee*, NEWS-TIMES (Ct.), Jan. 5, 2008.

184. *Id.*

adequately explain what the Danbury police would be doing.<sup>185</sup> Rotello explained, as an example, that the ICE ACCESS literature included programs regarding “asset forfeiture,” a function in which Rotello does not want Danbury police to be engaged.<sup>186</sup> But Rotello also takes issue with the ambiguous crime descriptions provided by the Police Department and endorsed by Mayor Boughton, including the inclusion of “work site investigation” within the enumerated powers of the local officers.<sup>187</sup> Mr. Rotello recognizes the danger of granting broad immigration authority to local police officers.<sup>188</sup> Whereas the Florida Memorandum of Understanding employed a structural limitation on authority by only empowering officers within the RDSTFs, which focused solely on domestic security concerns, the Danbury officers will be limited only by their own discretion and their inclination to follow the policy principles described by Mayor Boughton and Police Chief Baker.<sup>189</sup>

More importantly than the concerns of Mr. Rotello, however, are the concerns of the actual citizens and residents of Danbury.<sup>190</sup> Recent protests in Danbury highlight the importance of communication between a local government and the people over which it exercises power.<sup>191</sup> While a final Memorandum of Understanding has yet to be completed, residents have been left uninformed about the specifics of the agreement during the early stages of its creation.<sup>192</sup> The lack of effective communication, coupled with skepticism rooted in previous incidents, has led to wide scale demonstrations and protests.<sup>193</sup> Effective communication between a skeptical immigrant population and the local government is important not only to explain the specific intentions and limitations of the program, but also to combat the local media and newspaper editorials that fuel impassioned responses of local immi-

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185. *Id.*

186. *Id.*

187. See Nick Keppler, *Fire and ICE*, FAIRFIELD COUNTY WEEKLY, Jan. 10, 2008, available at <http://www.fairfieldweekly.com/article.cfm?aid=5148>. “I see this [letter] and it says ‘work site investigation’ and I think, ‘What does that mean? Does that mean, if you suspect a company is hiring undocumented people you can go in and take their computers? When do they get them back? How long will it take?’” *Id.*

188. See *id.*

189. See *id.*

190. See Driscoll, *ICE Dominates*, *supra* note 172.

191. See Keppler, *supra* note 187.

192. *Id.*

193. *Id.* On January 10, 2008, “[p]icketers circled City Hall [in Danbury] waving signs with slogans like Stop the Abuse of Power and Full Rights For All Immigrants!” *Id.* Other opponents of ICE and of the Danbury partnership have undertaken organizing “a boycott of businesses owned by Common Council members who voted for the ICE partnership.” News-Times Staff, *ICE*, *supra* note 172.

grants.<sup>194</sup> For example, just three weeks after the council approved cooperation with ICE, an article in *The News-Times*, a local Danbury newspaper, described Danbury's partnership with ICE as "a clever ruse by the mayor to divert people's attention from his dismal failure to come up with pragmatic and practical solutions to" illegal immigration.<sup>195</sup> The article continued by calling those who approved the partnership "racists," and explaining that the "move has frightened documented and undocumented immigrants, many of whom are already leaving."<sup>196</sup> Mayor Boughton has addressed the criticism by explaining that the discussion must happen in the middle, rather than dignifying the extreme opinions on the left and right of the political spectrum.<sup>197</sup> But given the reaction of the immigrant community in Danbury, and the incendiary commentaries appearing in the local media, it seems that the discussion needs to happen wherever there is concern, and not just where that concern may be considered legitimate.

#### D. *The Future Local Immigration Enforcement: Section 287(g) Goes National*

There are certain areas of immigration that seem ripe for section 287(g) expansion. Just recently, a spokesman for DHS explained that greater cooperation with state and local governments is desired for bolstering border security.<sup>198</sup> The Heritage Foundation has also advocated for increased use of section 287(g) in dealing with border security.<sup>199</sup> INA section 287(g) can

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194. See generally Gulamhusein A. Abba, Opinion Letter, *Boughton Panders to the Shrill Voices*, NEWS-TIMES (Ct.), Feb. 28, 2008.

195. *Id.*

196. *Id.*

197. Driscoll, *ICE Dominates*, *supra* note 172.

198. *Empowering Local Law Enforcement*, *supra* note 123, at 16 (statement of Kenneth A. Smith, Special Agent, ICE) (ICE is committed to "continue to establish and augment effective partnerships and information sharing with State and local law enforcement agencies. Such partnerships are essential to our mission of deterring criminal alien activity and threats to national security and public safety. We are grateful for [the work of] the many State and local law enforcement officers who assist ICE daily in [its] mission and we are pleased to assist them."). *Id.* at 17. "In the FY06 Emergency Funding Bill, \$50 million is being provided for the expansion of training for these authorities, including the training of additional local law enforcement officers to bolster border security efforts." *Id.* at 26.

199. James Jay Carafano, *Build on Section 287(g) of the Immigration and Nationality Act to Boost State and Local Immigration Enforcement*, HERITAGE FOUNDATION, Web Memo 1212, Sept. 14, 2006, at 1, available at [http://www.heritage.org/Research/HomelandSecurity/upload/wm\\_1212.pdf](http://www.heritage.org/Research/HomelandSecurity/upload/wm_1212.pdf).

Over the next few weeks, the House will consider, and likely pass, a series of measures to improve border security. Action from Congress on border security is welcome and long overdue. One subject requiring special attention is how to better engage state and local law en-



certainly be beneficial in this area.<sup>200</sup> Border states could contribute state and local officers to assist in the protection and immigration enforcement on the Mexican border.<sup>201</sup> Under a 287(g) agreement, officers would receive the proper training, as well as have access to the appropriate federal resources.<sup>202</sup> Task forces, similar to the RDSTFs in Florida, could be designed where state and federal officers can conduct investigations into human and drug smuggling organizations operating on and beyond the physical border.<sup>203</sup> This would allow for greater investigatory abilities into areas previously outside the scope of both the federal and state governments.<sup>204</sup>

With section 287(g) programs increasing throughout the country, and many programs receiving positive reports, the question looms: should cooperative agreements with the federal government under section 287(g) be mandated? The Heritage Foundation argues for a strengthening of section 287(g) by asking Congress to “[d]raft a strategy for implementing [section] 287(g) nationwide.”<sup>205</sup> This sentiment has been reflected in congressional bills, such as section 232 of the TRUE Enforcement and Border Security Act of 2005, which “[r]equires DHS to execute cooperative enforcement training programs in each state under INA [section] 287(g).”<sup>206</sup> Such sentiment, however, has not always been well received.<sup>207</sup>

The greatest limitation on potential abuse for these programs continues to be the discretion of the states or local governments in deciding whether to enter a partnership, and if so, what “type of partnership is most beneficial” to the particular locality.<sup>208</sup> Major cities throughout the country have resisted coercion from the federal government to enforce federal immigration laws.<sup>209</sup>

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forcement. The right answer is to strengthen and expand programs authorized under Section 287(g) of the Immigration and Nationality Act (INA).

*Id.*

200. *See id.*

201. Carafano, *Section 287(g)*, *supra* note 32, at 1.

202. *Id.* at 2.

203. *See id.*

204. *See id.*

205. *Id.*

206. TRUE Enforcement and Border Security Act of 2005, H.R. 4313, Section-by-Section Summary, xi, *available at* [http://www.fairus.org/site/DocServer/TRUE\\_Enforcement\\_section.pdf?docID=741](http://www.fairus.org/site/DocServer/TRUE_Enforcement_section.pdf?docID=741).

207. *See* Editorial, *More Immigration Non-Solutions*, N.Y. TIMES, July 12, 2009, at A18.

208. *See* News Release, New ICE ACCESS, *supra* note 134. In an assurance that these programs will not be forced on local communities, ICE explains that “ICE and local agencies will determine which type of partnership is most beneficial and sustainable before entering into an official agreement.” *Id.*

209. Press Release, Rep. Steve King, King-Campbell Amendment Passes: Protecting Police Officers’ Ability to Do Their Job (June 6, 2006), *available at* [http://www.house.gov/list/press/ia05\\_king/PRDHSAppropsamendment060606.html](http://www.house.gov/list/press/ia05_king/PRDHSAppropsamendment060606.html).

On June 6, 2006, the House of Representatives approved an amendment by United States Representatives Steven King and John Campbell that would “refuse federal funding for states and localities that have sanctuary policies to harbor illegal aliens.”<sup>210</sup> In response, the National League of Cities, U.S. Conference of Mayors, as well as six major cities around the country, addressed an urgent letter to the House of Representatives urging them to reconsider.<sup>211</sup> The letter explained that local enforcement hinders community oriented policing strategies, which use confidentiality as a means to encourage immigrants to cooperate with law enforcement.<sup>212</sup> The letter urged members of Congress not to “deny necessary homeland security funds to states” and localities who wish to utilize these community policing strategies effectively.<sup>213</sup>

Similarly, on October 15, 2007, just two months after the implementation of ICE ACCESS, Senator David Vitter proposed an amendment to the U.S. Senate Commerce, Justice and Science Appropriations Bill which would “withhold federal Community Oriented Policing Services funding from sanctuary cities.”<sup>214</sup> This time, the Major Cities Chiefs Association (MCCA)<sup>215</sup> addressed a letter to Barbara Mikulski, Chairwoman of the Subcommittee on Commerce, Justice, and State, urging her to oppose the Vitter Amendment.<sup>216</sup> The MCCA argued that denial of COPS funding would “make the streets of our major cities less safe and more riddled with crime.”<sup>217</sup> It is clear that the MCCA also believed that enforcement of immigration law was contrary to their community policing strategies.<sup>218</sup>

The U.S. Conference of Mayors makes it clear that its position is not anti-immigration enforcement, but rather protective of effective policing

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210. *Id.*

211. Ed Somers, *House Pushing Local Law Enforcement to Enforce Federal Immigration Laws*, U.S. MAYOR NEWSPAPER, Sept. 25, 2006, available at [http://usmayors.org/usmayornewspaper/documents/09\\_25\\_06/pg12\\_immigration.asp](http://usmayors.org/usmayornewspaper/documents/09_25_06/pg12_immigration.asp).

212. *Id.*

213. *Id.*

214. Press Release, Sen. Vitter, Vitter Offers Anti-Sanctuary Cities Amendment to CJS Appropriations Bill (Oct. 15, 2007), available at [http://www.votesmart.org/speech\\_detail.php?sc\\_id=324785&keyword=&phrase=&contain=](http://www.votesmart.org/speech_detail.php?sc_id=324785&keyword=&phrase=&contain=).

215. Major Cities Chiefs Association Home Page, <http://www.majorcitieschiefs.org> (last visited Nov 7, 2009). The Major Cities Chiefs Association “is comprised of the Chiefs of the sixty-three largest police departments in the United States and Canada.” *Id.*

216. Letter from Major Cities Chiefs Ass’n, to Barbara Mikulski, U.S. Sen. (Oct. 16, 2007) (on file with author).

217. *Id.*

218. *See id.*

strategies.<sup>219</sup> Undermining community policing efforts and alienating immigrants hinders crime reporting and other police functions, such as crime investigations and dealing with homegrown terrorism.<sup>220</sup> Resisting forced or coerced enforcement of federal immigration law by local law enforcement is not an anti-immigration enforcement stance, but merely recognizes that “state and local police should not be made to compensate for the federal government’s failure to update outdated immigration admissions policies.”<sup>221</sup>

### VIII. CONCLUSION

By establishing the first ever cross-designation program under INA section 287(g), Florida created a model by which state and local governments can and should follow when pursuing greater immigration enforcement at the state and local level. Section 287(g) programs may be effective for combating various immigration issues afflicting individual states, such as removal of aliens in the criminal justice system, and infiltrating and removing gangs through immigration enforcement. However, state and local governments must strike the right balance between assisting in immigration enforcement, and serving their citizens’ best interests.

The most effective means of protecting against civil rights abuses under section 287(g) programs is the discretion of state and local governments to enter into a partnership with the federal government. State and local governments are more accountable to their citizens than the federal government, and will take greater care to preserve community relations. Therefore, expansion of section 287(g) programs must remain discretionary. Mandating section 287(g) programs would not only be potentially harmful, but is also unnecessary. States have a strong desire to address immigration concerns within their districts, and expansion of INA 287(g) programs is inevitable as being a functional way to address these various concerns.<sup>222</sup>

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219. See Letter from the Nat’l League of Cities, U.S. Conference of Mayors, to a Member of Cong. (Sept. 19, 2006), available at <http://www.aialdownloads.org/advo/NationalImmigrationForum-LetterToCongress.pdf>.

220. *Id.*

221. Nat’l Immigration Forum, *Immigration Law Enforcement by State and Local Police*, BACKGROUNDER, Aug. 2007, at 6, available at <http://www.immigrationforum.org/images/uploads/Backgrounder-StateLocalEnforcement.pdf>.

222. See *The 287(g) Program Hearing*, *supra* note 3, at 53 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law) (The infrastructure for additional MOUs is already in place. The training model has been developed. And “[t]he success of Florida and Alabama is prompting law enforcement agencies across the country to knock on ICE’s door. Interest has been expressed publicly by leaders in Arizona, Connecticut, Orange County and San Bernardino County, California, and other jurisdictions.”).

Participating entities must find a balance between immigration enforcement and maintaining an effective relationship with the local community. State and local governments must continue to resist any forced or coerced cooperation with immigration enforcement that does not address any specific local need. The Florida Memorandum of Understanding effectively balanced state needs with citizen concerns, and remains a model for states that wish to address current and future immigration concerns.

## LONG-TERM PLANS FOR LGBT FLORIDIANS: SPECIAL CONCERNS AND SUGGESTIONS TO AVOID LEGAL AND FAMILY INTERFERENCE

MATTHEW T. MOORE\*+

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+ The author notes that this article is for informational purposes only and is not presented as legal advice. An individual wishing to implement the strategies discussed herein should consult legal counsel to tailor a long term plan appropriate to the individual's particular circumstances and needs.

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## I. INTRODUCTION

Perhaps because of its status as the “Sunshine State,” Florida is a growing population center for lesbian, gay, bi-sexual, and transgendered (LGBT) individuals and same-sex couples.<sup>1</sup> In fact, the latest surveys show that Florida ranks second in overall LGBT population, and second in the number of same-sex households.<sup>2</sup> Surprisingly, in per capita terms, Miami/Fort Lauderdale is not in the top ten of LGBT metropolitan areas, while Tampa/St. Petersburg ranks fifth nationally.<sup>3</sup> Although it is often said that to go south in Florida you need to head north, it is clear that LGBT discrimination is not just a concern in “liberal” South Florida, but impacts households all over the state.<sup>4</sup>

Despite Florida’s many attractions, thirty years after Anita Bryant made it the “Un-Shine State” in the emerging fight against gay and lesbian rights,<sup>5</sup> Florida remains one of the most legally hostile places for LGBTs to live in the United States. The recent passage of an amendment to the Florida Constitution that limits marriage, or the equivalent of marriage, to “one man and one woman” demonstrates that neither legislative nor societal hostility in Florida is likely to end soon.<sup>6</sup>

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1. See ADAM P. ROMERO ET AL., THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW: CENSUS SNAPSHOT: FLORIDA 1 (2007), available at <http://www.law.ucla.edu/WilliamsInstitute/publications/FloridaCensusSnapshot.pdf>. The number of Florida’s same-sex couples rose thirty-four percent from 2000 to 2005. See *id.* The LGBT designation is used throughout the article because of its universal use in modern media.

2. See GARY J. GATES, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW, SAME SEX COUPLES AND THE GAY LESBIAN BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY, app.1 (2006), available at <http://www.law.ucla.edu/WilliamsInstitute/publications/SameSexCouplesandGLBpopACS.pdf>.

3. *Id.* at 7.

4. See *id.* The breakdown of LGBT population by congressional district shows remarkable parity and decentralization in Florida population figures. See *id.* app. 3.

5. See Brumm.com, Anita Bryant, [http://brumm.com/gaylib/anitabryant1977\\_1.html](http://brumm.com/gaylib/anitabryant1977_1.html) (last visited Nov. 7, 2009). A popular button during Anita’s anti-gay campaign named Florida the “Un-Shine State.” *Id.*

6. See FLA. CONST. art. I, § 27 (amended 2008). Article I, Section 27 of the Florida Constitution states: “Inasmuch as marriage is the legal union of only one man and one woman

While it remains vital to continue the fight for equality and basic human rights, there is a practical need to handle the present reality of living in Florida as an LGBT individual.<sup>7</sup> And the word “individual” is used purposely, because even if you are in a long term, non-marital relationship, you are still an individual to the laws of Florida except under very limited circumstances.<sup>8</sup> But by using the laws that allow any individual—gay or straight, married or unmarried—to make the personal choices we associate with the time-honored constitutional traditions of privacy and self-determination, an LGBT individual can create relationships that have legal meaning in Florida.<sup>9</sup> Most of these “personal choice” laws are associated with disability and elder planning, are available in almost every state, and are often suggested to the LGBT community as important parts of a long term strategy.<sup>10</sup> By comprehensively employing these statutory choices with the right guidance, LGBT individuals not only gain peace of mind for the future, but minimize the danger of becoming a legal stranger to loved ones in states, like Florida, where LGBT’s have few supportive laws.<sup>11</sup>

This article takes the generalized suggestion of the importance of long-term planning and presents an in-depth examination and guide to the specific use and employment of Florida’s legislative scheme to provide protection to LGBT individuals. It illustrates the practical ways Florida laws can be used to avert real world stress. But it also proposes that even with the limitations of Florida law, there may be new solutions to giving these highly individualized choices even more legal strength, thereby creating a meaningful byproduct effect to Florida’s LGBT community as a whole.

Part II of this article looks at Florida’s “un-shine” laws and addresses the potential problems that can arise, and have arisen, when LGBTs face the challenges of aging or life’s unexpected disabilities. Part III focuses on three key areas of long-term planning under Florida law, which can create meaningful legal rights for LGBT’s health care, finances, and inheritance. Part IV proposes a number of strategies for insulating validly executed personal choices from legal challenges, and part V concludes the article.

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as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.” *Id.*

7. See NAT’L CTR. FOR LESBIAN RIGHTS, LIFELINES: DOCUMENTS TO PROTECT YOU AND YOUR FAMILY 2–4, available at [http://www.nclrights.org/site/DocServer/NCLR\\_LIFELINES.pdf?docID=521](http://www.nclrights.org/site/DocServer/NCLR_LIFELINES.pdf?docID=521) [hereinafter NCLR, LIFELINES]; see generally FLA. CONST. art. I, § 27.

8. See BROWARD COUNTY, FLA., CODE art. VIII, § 16 1/2-153 (2009); *infra* text accompanying notes 25–26.

9. See NCLR, LIFELINES, *supra* note 7, at 2–4.

10. See *id.*

11. See *id.* at 16.

## II. WHEN STATUTES ATTACK: THE DANGER OF NOT PLANNING

It is easy to say “you should plan for your future,” and easy to agree it is important. But whether it is called “elder planning” or “long-term planning,” it is simply too often left undone despite best intentions.<sup>12</sup> When Mike and Sue leave it undone, there are a myriad of laws that step into the breach to create solutions.<sup>13</sup> But if Mike and Steve leave it undone, it will create chaos if a surprise accident happens or the inevitabilities of aging ensue, because Florida law takes a dim view of homosexuality.

### A. Florida’s Legislative Hostility and Amendment 2

Florida has the only state law in the country that bans adoption by homosexuals.<sup>14</sup> Legislative bills that would remove the gay adoption ban face intense opposition.<sup>15</sup> In 2004, the Eleventh Circuit upheld the gay adoption ban as constitutional.<sup>16</sup> A recent state trial court victory finding the ban—once again—unconstitutional faces an uphill battle on appeal.<sup>17</sup> In fighting to overturn the trial court victory, Florida’s deputy solicitor general’s position is that “[t]here is evidence that homosexuals have higher rates of mental disorders, suicide and domestic violence. . . . This is a plausible rationale.”<sup>18</sup>

Florida embraced the Defense of Marriage Act (DOMA), restricting marriage to one man and one woman by legislative statute.<sup>19</sup> Florida courts have previously endorsed that, too.<sup>20</sup> Yet some gay rights opponents felt

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12. See, e.g., Dalia Sussman & Gary Langer, *Poll: Two-Thirds Back Spouse in Right to Die Cases*, ABC NEWS, Mar. 15, 2005, available at <http://i.abcnews.com/images/Politics/975a3schiavo.pdf>. Fifty-seven percent of Americans have no “living will or health care proxy.” *Id.*

13. See, e.g., FLA. STAT. §§ 689.15, 732.4015(1) (2009).

14. See FLA. STAT. § 63.042(3) (2009); Charles Lane, *Gay-Adoption Ban in Florida to Stand; Justices Decline to Hear Challenge*, WASH. POST, Jan. 11, 2005, at A4.

15. See *Lawmaker Hopes to End Ban on Gay Adoption in Florida*, ADVOCATE.COM, Mar. 20, 2008, [http://www.advocate.com/news\\_detail\\_ektid52818.asp](http://www.advocate.com/news_detail_ektid52818.asp).

16. *Lofton v. Kearney (Lofton I)*, 157 F. Supp. 2d 1372, 1374, 1385 (S.D. Fla. 2001), *aff’d* by *Lofton v. Sec’y of Dep’t of Children & Fam. Servs. (Lofton II)*, 358 F.3d 804, 806–08, 827 (11th Cir. 2004), *reh’g en banc and cert. denied*, *Lofton v. Sec’y of Dept. of Children & Fam. Servs. (Lofton III)*, 377 F.3d 1275, 1312–13 (11th Cir. 2004).

17. *In re Adoption of Doe*, 2008 WL 5006172, at 29 (Fla. 11th Cir. Ct. Nov. 25, 2008); see also Carol Marbin Miller & Gabriela Gonzalez, *Appeals Court Grapples with Gay Adoption*, MIAMI HERALD, Aug. 27, 2009, at A1.

18. Miller & Gonzalez, *supra* note 17.

19. Defense of Marriage Act, 1 U.S.C. § 7 (2006); FLA. STAT. § 741.212 (2009).

20. See, e.g., *Kantaros v. Kantaras*, 884 So. 2d 155, 155 (Fla. 2d Dist. Ct. App. 2004) (holding that a straight marriage where one spouse had had a sex change was invalid due to Florida’s position against same sex marriage).



even more was necessary to protect Florida from the LGBT community. Florida4marriage.org received enough signatures to place “Amendment 2” on the November 2008 general election ballot.<sup>21</sup> Amendment 2 passed with sixty-two percent of the vote,<sup>22</sup> and expands the statutory DOMA to a constitutional ban on any relationship, such as a civil union or domestic partnership, which approaches the legal equivalency of marriage.<sup>23</sup> Amendment 2’s passage only highlights the important premise of this article: LGBTs must take advantage of the Florida laws unaffected by Amendment 2 that actually can create effective legal relationships in key areas of anyone’s life journey.

### B. *Domestic Partnership Laws: Limited in Scope and Potentially Moot*

Currently, Broward, Miami-Dade, Monroe, and Palm Beach Counties, as well as the Cities of Tampa, Miami Beach, and Gainesville, offer limited Domestic Partnership protections.<sup>24</sup> While these ordinances are positive oases in Florida’s statutory landscape, the scope of their protections is limited and, as the population studies suggest, they do not geographically encompass a large percentage of Florida’s LGBT population.<sup>25</sup> These Domestic Partnership ordinances are similarly written, and offer some limited protections to unmarried couples.<sup>26</sup> Unmarried couples who meet a basic set of criteria to ensure they are in a committed relationship may register with the local government to legally establish their relationship.<sup>27</sup> Only registered couples are protected.<sup>28</sup> Once registered, unmarried couples in these municipalities generally enjoy: health care facility and jail visitation rights, assurance of non-discrimination in guardianship and health care surrogate designations, and county/city employee spousal benefits.<sup>29</sup> Broward County also gives preferences in contract bidding to vendors who offer domestic partnership benefits to employees.<sup>30</sup>

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21. *Florida Marriage Amendment Wins 62% Support*, FLA. BAPTIST WITNESS, Nov. 13, 2008, available at <http://www.floridabaptistwitness.com/9579.article>.

22. See Jennifer Mooney Piedra, *Gay-Marriage Foes Get Several Victories*, MIAMI HERALD, Nov. 5, 2008, available at <http://miamiherald.typepad.com/gaysouthflorida/2008/11/gay-marriage-fo.html>.

23. See FLA CONST. art. I, § 27 (amended 2008); Defense of Marriage Act, 1 U.S.C. § 7.

24. Equality Florida, Human Rights Ordinances Map, <http://www.eqfl.org/pdfs/eqflFloridaMaps.pdf> (last visited Nov. 7, 2009).

25. See GATES, *supra* note 2, at app. 2.

26. See MIAMI-DADE COUNTY, FLA., CODE art. IX, § 11A (2009); PALM BEACH COUNTY, FLA., CODE art. 1, § 2–6 (2009); BROWARD COUNTY, FLA., CODE art. VIII, § 16 1/2 (2009).

27. See, e.g., BROWARD COUNTY, FLA., CODE art. VIII, § 16 1/2-153.

28. *Id.*

29. See *id.* at § 16 1/2-159–61.

30. *Id.* at § 16 1/2-157.

But the backers of Amendment 2 have mounted legal challenges to Florida Domestic Partner laws before, and believe that Amendment 2 will give them the legal framework to win a new round of legal challenges.<sup>31</sup> At least one anti-LGBT activist and his “Florida Family Association” have vowed to use Amendment 2 in 2010 as a means for fighting same-sex benefits adopted by some Florida counties and municipalities, stating: “We’re going to use the momentum from the marriage amendment to speak to the fact that most people in this state don’t want a recognition of *that type of relationship*.”<sup>32</sup>

The domestic partnership laws have provided an extra layer of protection to unmarried couples fortunate enough to live in the few places that provide them. But Amendment 2 and the failure of a recent attempt to pass a statewide legislative protection for domestic partnerships reinforces the need to layer that protection as much as possible.<sup>33</sup> Furthermore, the protections only extend to the county line.<sup>34</sup> Broward’s protections will not reach into an Orlando hospital when a partner suffers a catastrophic injury at Disney-World. Thankfully, almost all of the protections conferred by the present domestic partner laws can be created by statute, for the benefit of any Florida resident no matter where they live.<sup>35</sup>

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31. See *Martin v. City of Gainesville*, 800 So. 2d 687, 687–89 (Fla. 1st Dist. Ct. App. 2001). For example, Florida4marriage.org was backed by the Liberty Counsel, a group of conservative lawyers who were legal counsel in the fight against Gainesville’s enactment of domestic partnership benefits. See Mathew D. Staver, *Florida Marriage Amendment Surges for November Ballot*, LIBERTY ALERT, Jan. 25, 2006, <http://www.lc.org/libertyalert/2006/la012506.htm>; see also HOWARD SIMON & REBECCA HARRISON STEELE, AM. CIVIL LIBERTIES UNION OF FLA., REPORT ON IMPLICATIONS OF FLORIDA’S PROPOSED MARRIAGE BAN (Apr. 2005), [http://www.aclufl.org/issues/lesbian\\_gay\\_rights/domesticpartnerbenefitsfinal.pdf](http://www.aclufl.org/issues/lesbian_gay_rights/domesticpartnerbenefitsfinal.pdf).

32. Bill Varian, Janet Zink, & Beth Reinhard, *Antigay-Rights Activist Seek to Ban Same-Sex Benefits*, ST. PETERSBURG TIMES, Nov. 21, 2008, available at <http://www.tampabay.com/news/politics/local/article911491.ece> (emphasis added) (quoting Waymon Hudson, *Domestic Partnership Benefits? They Are After Those Too*, THE BILERICO PROJECT, Nov. 21, 2008, [http://florida.bilerico.com/2008/11/domestic\\_partnership\\_benefits\\_they\\_are\\_a.php](http://florida.bilerico.com/2008/11/domestic_partnership_benefits_they_are_a.php)).

33. See S.B. 1642, Reg. Sess. (Fla. 2009), available at <http://www.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s1642.pdf>. Representative Eleanor Sobel introduced Senate Bill 1642 in 2009, but it died in committee. Florida Senate, Legislative Tracking: Fla. SB 1642 (2009), available at [http://www.flsenate.gov/session/index.cfm?BI\\_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2009&billnum=1642](http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2009&billnum=1642).

34. See BROWARD COUNTY, FLA., CODE art. VIII, § 16 1/2–151 (2009).

35. See Cynthia L. Barrett, *Same-Sex Couples in the Elder Law Office*, ELDER L. REP., Nov. 2007, at 1–2. For example, Broward’s protection for the right to make health care decisions for a partner is only effective if there *already is* a health care surrogate designation in place. BROWARD COUNTY, FLA. CODE, art. VIII §§ 16 1/2–158–159. Originally a designation would not have been required, but this was found invalid under Florida law. *Lowe v. Broward County*, 766 So. 2d 1199, 1210 (Fla. 4th Dist. Ct. App. 2000). Therefore, even Broward County cannot supplant the default legal priority a spouse or family member would have in

An even more practical concern is that even if they were available state-wide, the laws are not known as “Domestic Best Friends” laws. Approximately eighty-five percent of Florida’s LGBT population is single,<sup>36</sup> and many single LGBT’s have created “family” relationships with their friends that transcend blood ties, but those would not qualify as domestic partnerships.<sup>37</sup> The “personal choice” laws addressed in this article can provide legal benefits to any individual, whether they are in a domestic partnership or whether they would consider their best friend closer than a sister.<sup>38</sup> The bonus is that legally executing these personal choices in turn makes same-sex relationships, and the LGBT community as a whole, a stronger part of the legal fabric of Florida.

### C. *When Families Attack: In re Guardianship of Atkins*

A recent case in Indiana highlights the danger LGBT’s face in the absence of pre-planning.<sup>39</sup> *In re Guardianship of Atkins*<sup>40</sup> recently affirmed a religious family’s successful ousting of a twenty-five year life partner from their son’s life after he was disabled.<sup>41</sup> Although Florida’s guardianship laws are analyzed later in this article, the case is here as an illustrative “nightmare scenario” for anyone in a long-term gay relationship who does not pre-plan for the vagaries of life.

Patrick Atkins and Brett Conrad were life partners for over twenty-five years who shared their home and finances as a married couple would, but they were not accepted as a couple by Patrick’s deeply religious family.<sup>42</sup> Patrick was the CEO of his family’s business and earned more than four times as much as Brett did as a waiter, but unfortunately Brett was not titled on their “joint” bank accounts.<sup>43</sup> In 2005, while on a business trip to Atlanta, an aneurism and subsequent stroke severely disabled Patrick.<sup>44</sup> During his

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the absence of a designated health care surrogate. See FLA. STAT. § 765.401(1) (2009). In the absence of a designated surrogate, a guardian would have first priority, followed second by a spouse and third by family; number seven on the list of priority is “a close friend.” See FLA. STAT. § 765.401(1)(a)–(g).

36. See GATES, *supra* note 2, at app. 1.

37. See, e.g., BROWARD COUNTY, FLA., CODE art. VIII, § 16 1/2-153 (friends normally do not live together or pledge to provide the comfort and support of a spouse).

38. See NCLR, LIFELINES, *supra* note 7, at 3.

39. See *In re Guardianship of Atkins*, 868 N.E. 2d 878, 880–83 (Ind. Ct. App. 2007).

40. *Id.* at 878.

41. *Id.* at 880.

42. *In re Guardianship of Atkins*, 868 N.E. 2d at 880–81.

43. *Id.* at 881.

44. *Id.*

hospitalization, Patrick's mother said she would rather her son did "not recover at all" if recovery meant he would be reunited with Brett, and that she could not tolerate Brett's "evil" presence.<sup>45</sup> Although hospital and nursing facility staff bent the rules over the family's objections to allow Brett visitation after hours, the family was able to bar him once they took Patrick to their home.<sup>46</sup> When Brett petitioned for guardianship, the family counter-petitioned and the trial court sided with the family.<sup>47</sup> Although the opinion of the appellate court is quite sympathetic to Brett, it claimed it could not say that the trial judge had abused his discretion under Indiana law in appointing Patrick's parents as his guardians over his obviously committed and loving partner.<sup>48</sup> The only concessions Brett received were limited visitation, part of the value of their home, partial attorney's fees, and a small portion of the bank accounts.<sup>49</sup> This was still too much for the dissent, whose strongly worded opinion called the majority's award of limited visitation to Brett—and application of "common sense"—simply wrong and argued the rules of parental custody should have applied and barred Brett completely.<sup>50</sup> Given the current laws of Florida, there is certainly no assurance that a judge here would express any more sympathy for someone in Brett's position.

#### D. *Legal Stranger Danger*

In a 1999 lesbian parental custody proceeding, Florida's Fourth District Court of Appeal affirmed a lower court ruling that a woman was a legal stranger to the minor child she had raised with her ex-domestic partner, the biological mother.<sup>51</sup> A "legal stranger" is someone with no standing to bring suit, so she was barred from fighting for visitation rights and barred by the court from arguing it was in the "best interests of the child" to see her "other" mother.<sup>52</sup> Since blood and marital ties carry more legal weight over other relationships in Florida, a court could easily analogize this ruling to a "custody" fight over a disabled individual and rule against the life-long domestic partner in favor of a parent or other close family member.

To avoid being considered a "legal stranger" to the partner she has shared her life with, an LGBT Floridian must take action to protect her wish-

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45. *Id.*

46. *Id.* at 881–82.

47. *See In re Guardianship of Atkins*, 868 N.E.2d at 882.

48. *See id.* at 888.

49. *See id.* at 887–88.

50. *See id.* at 889 (Darden, J., dissenting).

51. *See Kazmierazak v. Query*, 736 So. 2d 106, 110 (Fla. 4th Dist. Ct. App. 1999), *rev. denied*, 760 So. 2d 947 (Fla. 2000).

52. *See id.* at 108–09.

es and interests.<sup>53</sup> No one likes to think that today is the day she will have an aneurism and/or stroke, but today is the day it could happen. No one likes to think about getting old and infirm, but it is a fact of life. Outlined below are the key personal choices LGBT Floridians can make to create an effective defense against legal stranger danger.

### III. THE THREE KEY AREAS OF LONG TERM PLANNING FOR LGBT FLORIDIANS

Florida's elder and long-term planning statutes contemplate a number of ways that any adult individual can designate another person to act for that individual when she cannot act for herself. These laws work the same whether that adult individual is gay or straight, married or unmarried. Among other strategies, Florida law allows LGBT's to designate "proxy"<sup>54</sup> health care decision-makers, pre-need guardians, and durable attorneys-in-fact for financial matters, and to designate the recipients of their estates.<sup>55</sup> These designations come under the broader sections outlined below: health and long-term medical care, financial affairs, and inheritance. "Incapacity" in the context of this article means that an adult has lost the ability to competently make his own decisions because of physical and/or mental impairment.<sup>56</sup> Incapacitation tends to trigger a number of legal consequences for the individual.<sup>57</sup> For the sake of simplicity, this article will use a fictional long-term same-sex couple, "Mike and Steve," where Mike's mom refuses to accept the relationship. However, the situations described could just as easily apply to "Susan and Jane," lesbian best friends living far from their families who consider each other closer than sisters.<sup>58</sup>

#### A. *Health and Long-Term Medical Care*

Health care is probably the most important area of planning, and the one with the most strategic options. Whether an individual is temporarily or

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53. See NCLR, *LIFELINES*, *supra* note 7, at 3.

54. "Proxy" is used here for its general definition of selecting someone to act on your behalf. DICTIONARY.COM, <http://dictionary.reference.com/browse/proxy> (last visited Nov. 7, 2009).

55. See FLA. STAT. §§ 709.08, 732.501, 744.3045, 765.202 (2009).

56. BLACK'S LAW DICTIONARY 828 (9th ed. 2009).

57. See FLA. STAT. § 765.102 (2009).

58. The author does not mean to imply that all LGBTs have conflicted blood-family relationships. However, it is the opinion and twenty five year gay adult experience of the author that LGBTs will often choose someone other than family to be life decision-makers even when they have close, supportive family relationships.

permanently incapacitated by accident or disease, or is simply disabled by advancing age, in the absence of a valid designation otherwise an individual's family members will take precedence over a domestic partner.<sup>59</sup> As explained below, without a "HIPAA" form and advance directive for health-care,<sup>60</sup> if Mike is seriously injured in a car accident tomorrow resulting in a coma, Mike's mother can legally keep Steve out of Mike's hospital room, bar his access to pertinent medical updates, and can take over medical decision-making for Mike. Without a living will, if Mike is in a persistent vegetative state, his mother can keep him alive even if Mike had told Steve over and over again that he would not want to be kept alive in that condition.<sup>61</sup> Only a spouse would have a fighting chance of overruling the mother in Florida courts.<sup>62</sup> The following forms can alter these outcomes.

### 1. HIPAA Forms

Hospitals can and do forbid non-family members from accessing their loved ones.<sup>63</sup> Miami's Jackson Memorial Hospital was sued for refusing to allow a Seattle woman and her three children access to the woman's life partner of eighteen years, Lisa Pond, when Ms. Pond was brought in after experiencing an aneurism at the start of a 2007 cruise vacation and declared brain dead.<sup>64</sup> The hospital refused to speak to the woman or give her updates, and denied visitation "until nearly eight hours after their arrival."<sup>65</sup> Lambda Legal calls this unethical and discriminatory, but there is no legal mandate that required Jackson Memorial to act otherwise.<sup>66</sup> In fact, a federal judge recently dismissed the case.<sup>67</sup>

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59. See FLA. STAT. § 765.401(1).

60. See *id.*

61. See *id.*

62. See Mary Coombs, *Schiavo: The Road Not Taken*, 61 U. MIAMI L. REV. 539, 542 (2007).

63. See, e.g. Lambda Legal, *A Year After Death, Lesbian Fights for Justice for Partner* (Feb. 21, 2008), <http://www.lambdalegal.org/news/pr/lesbian-fights-for-justice-for-partner.html>.

64. *Id.*

65. *Id.*

66. *Id.*

67. Steve Rothaus, *Lesbian's Case Against Jackson Memorial Hospital Tossed*, MIAMI HERALD, Sept. 30, 2009, at B3, available at <http://miamiherald.typepad.com/gaysouthflorida/2009/09/court-dismisses-suit-by-lesbian-who-couldnt-see-dying-partner-at-miamis-jackson-memorial-hospital.html>

A HIPAA form may create the legal mandate.<sup>68</sup> The Federal Health Insurance Portability and Accountability Act of 1996 brought the HIPAA acronym into the medical lexicon.<sup>69</sup> A HIPAA form allows an individual to designate who may or may not access his pertinent private medical information.<sup>70</sup> Under HIPAA regulations, every medical provider now requires a patient to fill out a HIPAA compliance form.<sup>71</sup> If a patient is competent and conscious, medical providers are forbidden to divulge a patient's pertinent medical information to anyone not designated.<sup>72</sup> Such designation can be written or can be inferred from the circumstances if the patient does not object to the presence of someone hearing information.<sup>73</sup> But if a patient is incapacitated and there is no designation, medical providers may use their *professional judgment* to decide whether to disclose or not to disclose, with family members taking precedence in the wording of the regulations.<sup>74</sup> However, since the regulations allow an individual to create their own HIPAA form, as long as it complies with the regulatory conditions, it should be accepted by any medical provider.<sup>75</sup>

In Mike's situation, where he enters the hospital in a coma, unable to fill out a HIPAA form, the hospital's doctors may exercise their professional judgment to choose his mother over Steve, and subsequently respect her wishes to keep Steve away. If Mike has not previously filled out a form authorizing Steve's access to his medical information, Steve has no substantive recourse against the hospital or Mike's mother. All Mike and Steve needed to do before the accident was properly fill out their own HIPAA forms. Their personal physician should be able to provide them with one, which could be kept on file and faxed to the hospital in an emergency.

## 2. Advance Directives for Health Care—Surrogate Decision Maker

A HIPAA form allows access to information, but in order to make medical decisions for Mike, Steve needs to be Mike's designated health care sur-

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68. See generally Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. § 201).

69. See generally *id.* The act mandated that new regulations be promulgated to safeguard access to health care information. *Id.* Under the regulations, an individual, to ensure privacy, must designate who is allowed access to information related to his or her medical care. See 45 C.F.R. §§ 164.502, .508 (2008).

70. See 45 C.F.R. § 164.510.

71. See *id.* § 164.508(a)(1).

72. See *id.* § 164.510(b)(2).

73. *Id.*

74. *Id.* § 164.510(b)(3) (emphasis added).

75. See 45 C.F.R. § 164.508(b).

rogate. Florida law governing this designation is found in the Civil Rights section of the *Florida Statutes*, since such designations are linked to the traditional common law and constitutional right to autonomy in medical decision-making.<sup>76</sup> As Justice Cardozo once famously remarked, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>77</sup> That right is extended under Florida law to Steve if Mike is incapacitated and has validly designated Steve to act on his behalf.<sup>78</sup> In the absence of this designation, a court *must* follow the legislative scheme for choosing a proxy in a prioritized order.<sup>79</sup> In that scheme, Mike’s mom is well ahead of “a close friend” like Steve in priority.<sup>80</sup>

To foreclose that outcome, Mike, as principal, must execute a written document that designates Steve as his health care surrogate.<sup>81</sup> The legislature has provided a valid blank form,<sup>82</sup> but, as with any of the documents described in this article, expert legal advice is the best way to create a designation that is tailored to Mike’s specific needs and current law. The surrogate designation document must be witnessed by two adults, and the surrogate shall not serve as a witness.<sup>83</sup> The surrogate must get a copy of the document, and it remains in effect until it is revoked by the principal.<sup>84</sup> The surrogate’s ability to make decisions for the principal is triggered by the principal’s incapacity, and the surrogate’s role ends when, and if, capacity is regained by the principal.<sup>85</sup> Incapacity is initially determined and noted by the attending physician, and if there is any doubt about capacity, a second physician will also evaluate the principal’s capacity.<sup>86</sup> When a person has been declared incapacitated by a medical provider, the provider has a duty to inform the surrogate.<sup>87</sup> It should be noted, a determination of incapacity under the surrogate designation statute, without more, has no legal effect

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76. See FLA. STAT. § 765.102(1) (2009) (asserting the Florida Legislature’s intent to codify the right to health related autonomy); see, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990) (explaining the common law and United States Constitution’s foundations for the doctrine of informed consent).

77. *Cruzan*, 497 U.S. at 269 (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

78. See FLA. STAT. § 765.102(2).

79. See FLA. STAT. § 765.401(1).

80. See FLA. STAT. § 765.401(1)(d), (g).

81. See FLA. STAT. § 765.202(1).

82. FLA. STAT. § 765.203.

83. FLA. STAT. § 765.202(1)–(2).

84. FLA. STAT. § 765.202(1), (6).

85. FLA. STAT. § 765.204(1), (3).

86. FLA. STAT. § 765.204(2).

87. *Id.*



beyond health care decision-making.<sup>88</sup> This is one reason that LGBTs must take a comprehensive approach to executing all of the legal documents available to them for long term planning.

Unless limited by the surrogacy document, a surrogate has the right to act on the patient's behalf as if he were the patient himself.<sup>89</sup> The surrogate's decision making is guided by his knowledge of what the principal would want, or by considering the principal's best interests.<sup>90</sup>

Where Mike enters the hospital in a coma, he is both physically and mentally impaired, and his incapacity will easily be judged by the attending physician. At that point, Steve, by producing the valid surrogate form, supersedes Mike's mom and can make the necessary medical decisions for his partner without any need to consult the mom.<sup>91</sup> Since the statute specifically says a surrogate controls access to medical information,<sup>92</sup> Steve could even restrict the mother's access if he knows Mike was estranged from his mother and believes that is what Mike would want. However, because of Florida's state interest in preserving life,<sup>93</sup> there are some specific and important limitations on the scope of the surrogate's decision-making, which may require a valid living will to overcome.<sup>94</sup>

### 3. Advance Directives for Health Care—Living Wills

If Mike comes out of his coma and recovers from his accident, hopefully the scare will convince him and Steve that as they continue to age they may be faced with another life-threatening situation or terminal disease that requires an end-of-life decision. End-of-life decision-making is contemplated by another form of advance directive under the *Florida Statutes*—the “living will.”<sup>95</sup> Living wills allow someone to express his wishes about refusing life-prolonging medical care if he cannot make those decisions for himself.<sup>96</sup>

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88. FLA. STAT. § 765.204(4).

89. See FLA. STAT. § 765.205(1)(a).

90. FLA. STAT. § 765.205(1)(b).

91. See FLA. STAT. § 765.205(1)(a).

92. FLA. STAT. § 765.205(1)(d), (2).

93. See FLA. STAT. § 765.102(1).

94. See FLA. STAT. § 765.113.

95. See FLA. STAT. § 765.101(11).

96. *Id.* A living will or declaration should not be confused with a “Do Not Resuscitate” Order, which may only be executed by a doctor on a special yellow form, and is designed to keep emergency medical personnel from reviving someone dying. See FLA. ADMIN. CODE R. 64J-2.018 (2009).

A living will is created and executed in the same way a health care surrogate is designated, and the Florida Legislature has provided a statutory blank form that may be used as a template.<sup>97</sup> Once again, it is strongly suggested that individuals have experts draft documents tailored to specific needs. Living wills are triggered if “[t]he principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state” (PVS).<sup>98</sup> End-stage conditions and terminal illnesses are irreversible conditions where there is severe physical deterioration and/or an expectation of resulting death.<sup>99</sup> A PVS is an irreversible and permanent state of unconsciousness marked by no cognitive or communicative ability.<sup>100</sup> The existence of one of these triggering conditions is medically affirmed by two independent physician evaluations,<sup>101</sup> and requires a finding that there is no reasonable medical chance the patient will recover capacity to make the present decision for himself.<sup>102</sup>

Many people joke about “pulling the plug,” but if Mike has not explicitly given Steve the power to make end-of-life decisions and has not executed a living will, Steve’s ability to make the most vital decisions could be curtailed. Although she might not be his surrogate, Mike’s mom can more easily convince a judge to keep her son on life support if there is any ambiguity about whether Mike would “pull the plug.”<sup>103</sup> A well drafted surrogate form and living will can ensure Mike’s wishes are honored by Steve.<sup>104</sup> If Mike’s coma had resulted in a PVS, once two doctors had independently confirmed the PVS, Mike’s living will expressing his wish to refuse life-prolonging medical treatment would be triggered.<sup>105</sup> As Mike’s surrogate, Steve would be authorized to carry out those wishes.<sup>106</sup> Mike could execute a valid living will without designating Steve as the surrogate decision maker;<sup>107</sup> but by designating Steve, Mike is making a stronger, unambiguous statement of his overall wish to have Mike act on his behalf at such life-altering times.<sup>108</sup>

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97. See FLA. STAT. §§ 765.302, .303.

98. FLA. STAT. § 765.304(2)(b); see also FLA. STAT. § 765.101(12) (defining “persistent vegetative state”).

99. FLA. STAT. § 765.101(4), (17).

100. FLA. STAT. § 765.101(12).

101. FLA. STAT. § 765.306.

102. FLA. STAT. § 765.304(2)(a).

103. Compare FLA. STAT. § 765.401(1)(d), with FLA. STAT. § 765.401(1)(g).

104. See FLA. STAT. § 765.102(2).

105. See FLA. STAT. §§ 765.204(2)–(3), .305.

106. See FLA. STAT. § 765.205(1)(b).

107. See FLA. STAT. § 765.304(1).

108. See FLA. STAT. § 765.205.

#### 4. Preneed Guardians

Incapacity does not always mean a person is in an end stage condition thereby triggering a living will.<sup>109</sup> Incapacity in a person with a long life expectancy may lead to guardianship.<sup>110</sup> Florida's guardianship statutes are very extensive, and while the legislature acknowledges its seriousness, anyone—perhaps an opportunistic nephew—can petition a court to be someone's guardian and strip a person of his civil rights and autonomy.<sup>111</sup> A guardian is a court appointee who makes personal and/or financial decisions on an incapacitated person's behalf.<sup>112</sup> Designating a preneed guardian is a way to tell the court who you think your guardian should be.<sup>113</sup>

The designation is made through a written declaration, witnessed by two adults, where the principal identifies the person he chooses to be his guardian in the event of incapacity.<sup>114</sup> A person may also designate an alternative choice in case his first choice refuses or is unavailable or is unqualified.<sup>115</sup> The declaration may be filed with a court for later use during a guardianship proceeding.<sup>116</sup> Although the preneed guardian assumes his duties as soon as the adjudication of incapacity takes effect, he must petition the court to affirm the choice within twenty days.<sup>117</sup> The court is free to decide if the choice for preneed guardian is not the right choice and not honor the declaration.<sup>118</sup> Therefore, it is important to choose the right person and be aware that if, for example, the guardian chosen has a prior felony conviction, the court will invalidate the choice.<sup>119</sup>

Mike could simply develop Alzheimer's disease, remaining physically vital for years while being lost mentally. Assuming Steve still has capacity, and is otherwise qualified, he could be Mike's guardian if they have pre-planned and executed the valid declaration of preneed guardianship. Without it, even if Mike designated Steve as his surrogate medical decision maker, the surrogate statute allows a court to appoint someone other than Steve as

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109. See FLA. STAT. §§ 765.101(8), .204(4).

110. See FLA. STAT. § 744.3215(1)(e) (2009).

111. See FLA. STAT. §§ 744.1012, .3201. A full review of the guardianship statutes is beyond the scope of this article. Moreover, the legislative scheme for guardianship is complicated and expert counsel is advised.

112. FLA. STAT. § 744.102(9).

113. See FLA. STAT. § 744.3045(4).

114. FLA. STAT. § 744.3045(1), (2).

115. FLA. STAT. § 744.3045(6).

116. See FLA. STAT. § 744.3045(3).

117. FLA. STAT. § 744.3045(5), (7).

118. See FLA. STAT. § 744.3045(7).

119. FLA. STAT. § 744.309(3).

Mike's guardian.<sup>120</sup> Steve could end up making medical decisions for Mike while a complete stranger or unfriendly family member takes over Steve's personal and financial affairs. Designating Steve as his preneed guardian will give Mike a reasonable assurance that someone he knows and trusts will be his guardian if it is ever needed.

## B. *Financial Affairs*

The second key area of long term planning for LGBTs is in their financial affairs. Unless a married couple takes steps to separate individual assets from their marital estate, Florida law tends to regard all of their assets as assets of the marriage no matter whose name is listed as owner.<sup>121</sup> Mike and Steve, on the other hand, must be very careful about structuring their financial lives to avoid both personal and tax pitfalls.<sup>122</sup> The full range of considerations in long term financial planning for LGBTs is beyond the scope of this article, but there are basic tools at Mike and Steve's disposal to protect their most important assets.

### 1. The Basics: Financial Accounts and Homes

Florida law presumes that two people who jointly title themselves on a deposit account, in the absence of language or contract to the contrary, expect the ownership of that account to be as joint tenants with the rights of survivorship (JTWROS).<sup>123</sup> That means that if Mike and Steve open up a joint checking account, and one of them passes away, the surviving partner then automatically has title to the entire account without going through probate.<sup>124</sup> This presumption only applies to deposit accounts, such as standard checking and savings accounts.<sup>125</sup> Investment accounts usually require a specific designation that the owners want it titled as JTWROS.<sup>126</sup> If Mike and Steve pooled their finances in an account titled solely in Mike's name

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120. See FLA. STAT. § 765.205(3) (2009).

121. See FLA. STAT. § 61.075(6) (2009).

122. Please note that nothing written in this section should be construed as tax advice, nor is it intended to be any form of tax advice or tax strategy. A tax professional must be consulted to address the specific needs of the taxpayer.

123. BAC Florida Investments, Overview of Types of Accounts, <http://www.bacinvestments.com/joint.htm> (last visited Nov. 7, 2009) [hereinafter Overview of Types of Accounts]; see FLA. STAT. § 655.79(1) (2009).

124. See FLA. STAT. § 655.79(1).

125. See *id.*

126. Overview of Types of Accounts, *supra* note 123.

and Mike passed away, those funds would pass into Mike's probate estate.<sup>127</sup> Depending on Mike's estate planning, Steve might have to fight to regain any of the assets he put in Mike's account.<sup>128</sup>

Therefore, Mike and Steve need to plan the structure of their financial accounts, and no money should be pooled into a solely titled account unless it accomplishes another goal, as suggested by an expert. Seeking expert advice is crucial since certain deposits into joint accounts by one person could trigger the Federal Gift Tax for the other person.<sup>129</sup>

Another basic financial asset is a shared home, and Florida homeowners who are unmarried and have no minor children are free to title their homes as JTWROS with an unrelated individual as a co-owner.<sup>130</sup> As with a bank account, the titling of the property as JTWROS allows the surviving owner to take title to the entire property without it passing through probate.<sup>131</sup> If the home is titled solely in Mike's name and Mike dies without a will, the home will pass into his estate and probably go to his family.<sup>132</sup> However, as with financial accounts, not seeking expert advice may have consequences.<sup>133</sup> For example, if Mike had owned his home alone prior to their relationship and had substantial equity in the home, and then added Steve to the title without Steve paying for his share, there can be major tax implications for Steve.<sup>134</sup>

#### a. Cohabitation Agreements

Of special note to same sex couples who share a home is the creation of a "cohabitation agreement."<sup>135</sup> It can be especially effective if one person is unable to have title in the home. Such an agreement may spell out the ownership interests of real and personal property, apportionment of tax benefits and liabilities, and dissolution of the agreement and division of the property in the event of a break-up.<sup>136</sup> Surprisingly, a Florida court upheld such a

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127. See FLA. STAT. §§ 732.101(1), 733.607(1) (2009).

128. See *In re Guardianship of Atkins*, 868 N.E.2d 878, 880–83 (Ind. Ct. App. 2007) (finding that where a partner's solely titled bank account came under parents' control as guardians, other partner had to go to court to prove some funds were his).

129. See Lambda Legal, Tax Considerations for Same-Sex Couples, at 1 n.2, available at [http://data.lambdalegal.org/pdf/tax\\_bulletin\\_2006.pdf](http://data.lambdalegal.org/pdf/tax_bulletin_2006.pdf) (last visited Nov. 7, 2009) [hereinafter Lambda Legal, Tax Considerations].

130. See FLA. STAT. §§ 689.15, 732.4015(1) (2009); see Lambda Legal, Tax Considerations, *supra* note 129, at 3.

131. Lambda Legal, Tax Considerations, *supra* note 129, at 3.

132. See FLA. STAT. § 732.101(1).

133. See Lambda Legal, Tax Considerations, *supra* note 129, at 1 n.2.

134. See *id.* at 3.

135. See *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. 5th Dist. Ct. App. 1997).

136. See BLACK'S LAW DICTIONARY 296 (9th ed. 2009).

contract between two lesbians that even called for support payments.<sup>137</sup> The court recognized that Floridians are guaranteed the ability to contract away their property rights as long as the basis of the contract is not sexual services.<sup>138</sup> Although the court went to great pains to distinguish the contract from a marital contract,<sup>139</sup> it is another way to solidify property rights in Florida that has survived judicial scrutiny.

## 2. Durable Powers of Attorney

Another basic tool of value to LGBTs in Florida is the creation of a durable power of attorney (DPOA). A DPOA is created when someone executes a written document naming a competent adult as his “attorney-in-fact,” with the power to act on the principal’s behalf in financial and property matters as specified in the document.<sup>140</sup> The document must be “executed with the same formalities required” to transfer real estate, and to survive incapacity of the principal, *must* include the words: “This durable power of attorney is not affected by subsequent incapacity of the principal except as provided in [section] 709.08, *Florida Statutes*.”<sup>141</sup> A DPOA remains in effect until death or revocation by the principal, or the incapacity of the designated attorney-in-fact.<sup>142</sup> Although a standard DPOA allows the designated attorney-in-fact to act on the principal’s behalf before incapacity,<sup>143</sup> its true value comes after incapacity.

If Mike is ever incapacitated by accident or illness, Steve would be able to act on Mike’s behalf and handle his financial and property affairs as if he were Mike.<sup>144</sup> If the incapacity is only temporary, Steve can pay Mike’s bills and manage his accounts to guard against deterioration of Mike’s credit.<sup>145</sup> If the incapacity is permanent, recent Florida case law has held that a principal’s competent granting of a DPOA may negate the need or requirement to

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137. *Posik*, 695 So. 2d at 760.

138. *Id.* at 762.

139. *Id.* at 763 (Peterson, C.J., concurring).

140. 2 FLA. JUR. 2D *Agency and Employment* § 32 (2005).

141. FLA. STAT. § 709.08(1) (2009). The formalities to transfer real estate generally means the document must be notarized and witnessed to be valid. FLA. STAT. § 695.03 (2009).

142. FLA. STAT. § 709.08(3)(b).

143. *See* FLA. STAT. § 709.08(1). A DPOA may be set up to “spring” into effect only upon incapacitation of the principal, but it would then require a physician’s determination of incapacity which might create a burdensome delay. FLA. STAT. § 709.08(1), (4)(d).

144. *See* FLA. STAT. § 709.08(1).

145. *See id.*

later appoint a guardian due to later incapacity.<sup>146</sup> Therefore, a DPOA, when executed in concert with the other documents discussed herein, would act to support an argument by Steve that Mike meant for him to manage his affairs, if Mike's mother challenged Steve's authority.<sup>147</sup> A DPOA is one more example of a legally valid individual choice that may strengthen the legal standing of Mike and Steve as a couple.

### C. *Inheritance*

The final area in which Florida's statutes allow the LGBT individual to give legal effect to his non-family relationships is in the area of inheritance.<sup>148</sup> When a person dies without a will he is said to have died "intestate."<sup>149</sup> In intestacy, the person's assets—with the exception of assets like insurance policies with named beneficiaries—become part of the intestate estate and will be distributed according to Florida statutes.<sup>150</sup> The legislative scheme for distributing the estate only includes family members related by blood, marriage, or adoption.<sup>151</sup> If there are no family members, the estate goes to the State of Florida.<sup>152</sup> If an individual wants to distribute his or her estate in another manner, it simply must be specified with valid legal documents.

#### 1. Wills and Other Traditional Beneficiary Documents

A validly executed will is the easiest way for any person to designate the recipients of his estate. To be valid, a will must be in writing and adhere to the "formalities" of execution in the *Florida Statutes*.<sup>153</sup> Oral wills and wills that are not witnessed, as prescribed by statute, have no legal effect in Florida.<sup>154</sup> An unmarried person with no minor children has the right, under Florida's Constitution, to devise his estate as he prefers.<sup>155</sup> A will is one area

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146. *Smith v. Lynch*, 821 So. 2d 1197, 1197, 1199 (Fla. 4th Dist. Ct. App. 2002).

147. *See id.* at 1997.

148. *See* FLA. STAT. § 732.501 (2009).

149. *See* FLA. STAT. § 732.101.

150. FLA. STAT. §§ 732.2035(6)–(7), .2045(1)(e).

151. *See* FLA. STAT. §§ 732.102, .103, .108.

152. FLA. STAT. § 732.107(1).

153. *Id.*

154. *See id.*

155. *See* FLA. STAT. § 732.501. A spouse left out of a will, absent another agreement, has a statutory right to claim a percentage of the estate, no matter how it was devised. FLA. STAT. § 732.201. *But see* *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 69 (Fla. 1990) (holding that a decedent's decision to exclude his children from inheritance in favor of a charitable bequest is the decedent's right).

where courts almost never overrule the clear intent of the decedent.<sup>156</sup> If Mike validly makes Steve the recipient of his estate by will, Mike's family will have very little chance of legal recourse.<sup>157</sup>

Another easy way for any individual to make his inheritance wishes known is to designate someone as the beneficiary of insurance policies or other benefits that are paid on death, such as retirement plans. Surprisingly, Congress recently changed federal retirement plan law under the Pension Protection Act of 2006,<sup>158</sup> to provide important tax benefits to non-spouse beneficiaries of employee benefit plans such as 401(k)s.<sup>159</sup> Previously, only spouses were allowed to "roll over" the funds in the decedent's retirement account into another account and avoid the severe tax penalties of early withdrawal.<sup>160</sup> And before death, only the medical and financial emergency needs of a spousal beneficiary qualified for an early "hardship distribution" of retirement plan assets without severe penalties.<sup>161</sup> The Pension Protection Act of 2006 extended both of these tax saving benefits to anyone designated as a retirement plan beneficiary.<sup>162</sup> Mike should check the status of all of his policies and employee benefits to ensure that Steve is his designated beneficiary, especially if those policies and benefits were commenced prior to his relationship with Steve. Again, Mike's family will have little legal recourse to interfere with Mike's wishes.

## 2. Revocable Living Trusts

The inheritance devices mentioned above are relatively simple, but as with all the long-term planning tools mentioned in this article, it is advisable to seek help from elder and long-term planning experts. This is especially true if an individual has an array of assets and wishes to bypass the probate process every will must go through. The tool for this probate bypass requires a bit more planning and is known as a "revocable living trust" (RLT).<sup>163</sup> Where wills are public documents, RLTs are private and avoid scrutiny from

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156. See *Shriners Hosps. for Crippled Children*, 563 So. 2d at 66.

157. See *id.*

158. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1, 120 Stat. 780 (2006) (codified as amended in scattered sections of 29 U.S.C.).

159. See Barrett, *supra* note 35, at 2.

160. See *id.*

161. *Gays Included in New Federal Pension Law*, ADVOCATE.COM, Aug. 19, 2006, [http://www.advocate.com/news\\_detail\\_ektid35697.asp](http://www.advocate.com/news_detail_ektid35697.asp).

162. *Id.*

163. FLA. STAT. §§ 736.0601-.0604 (2009).



unhappy relatives.<sup>164</sup> While wills must go through probate, and can become subject to lawsuits that can tie up and deplete the estate, the assets of the RLT pass immediately to the beneficiaries upon death.<sup>165</sup> The ability to contest an RLT is much more limited.<sup>166</sup> Almost any asset that can be devised by will can be transferred upon death via an RLT.<sup>167</sup> The creation and execution of valid RLT documents follows the same rules governing the execution of a will.<sup>168</sup>

As Mike ages, he may acquire substantial assets. Although his mother may have passed on, siblings, nieces and nephews might be eyeing a portion of his estate. If they could successfully contest and invalidate his will, Mike would be deemed to have died intestate, and Florida law would give them his estate.<sup>169</sup> By creating an RLT, his family does not have that statutory scheme to rely on, and he stands a far better chance of preserving his inheritance plans. If Mike and Steve are meeting with long-term planning experts to create a comprehensive plan for cementing their wishes and creating some legal status in their relationship, an RLT may be an appropriate tool to add to the mix at the same time.

#### IV. STRATEGIES FOR SECURING PERSONAL CHOICE

Nowhere in the United States Constitution does it expressly say that a person has a right to privacy and autonomy in making the decisions that affect the intimate ordering of her life.<sup>170</sup> But a long line of United States Supreme Court decisions, starting in the 1960s, has affirmed these rights for every competent adult.<sup>171</sup> Yet, the Court has stopped short of holding that these rights extend by default to someone acting as that person's proxy when she becomes incapacitated.<sup>172</sup>

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164. Rande Spiegelman, *A Living Trust Can Help You and Your Heirs*, CHARLES SCHWAB, Mar. 24, 2004, <http://www.schwab.com> (search "A Living Trust Can Help You"); see also 12 BRIAN V. MCAVOY ET AL., *FLORIDA ESTATE PLANNING* §§ 7:1, 7:11 (2008–2009 ed., West).

165. Spiegelman, *supra* note 164.

166. 12 MCAVOY ET AL., *supra* note 164, § 7:11.

167. See Spiegelman, *supra* note 164.

168. FLA. STAT. § 736.0403(2)(b) (2009).

169. See FLA. STAT. § 732.101 (2009).

170. See *Planned Parenthood v. Casey*, 505 U.S. 833, 951 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

171. See, e.g., *Roe v. Wade*, 410 U.S. 113, 166 (1973) (establishing a woman's right to control her choice to reproduce); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (establishing the concept of the penumbra of rights inferred from various parts of the Constitution).

172. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289–90 (1990) (O'Connor, J., concurring).

Florida's Constitution expressly does guarantee its competent citizens a right to privacy,<sup>173</sup> and that right has served as the foundation for cases affirming personal intimate choices.<sup>174</sup> But when that competent Floridian becomes incapacitated, her validly executed personal choices of who she wanted to handle her affairs is transformed by Florida's statutes into "rebuttable presumptions" that can be legally challenged.<sup>175</sup> A rebuttable presumption means that a challenger can try to prove that the personal choices expressed in the documents are defective or not contemporary enough to reflect the choice the incapacitated person would now make.<sup>176</sup> Therefore, even when LGBT's validly create legal relationships and status with those they are closest to, other parties have a statutory basis to challenge and invalidate those legal relationships.<sup>177</sup> And, as noted throughout this article, Florida law tends to prioritize family ties over personal ones.<sup>178</sup>

But LGBT's who create a comprehensive plan that encompasses most or all of the documents described here lay a stronger foundation for defending that presumption when they can no longer defend it themselves.<sup>179</sup> The cumulative effect of those individual choices, designating that one special person in someone's life as her proxy, counters arguments that her choices were ambiguous or defective. Until the law catches up with today's reality of complex relationships,<sup>180</sup> there are a number of strategies for creating the best possible chance that personal choices will be effective and respected.<sup>181</sup>

### A. *Practical Steps*

When executing his or her planning documents, any individual can take some simple, practical steps to erase doubt about "what she really wanted." For example, she might consider:

- Not only designating the person chosen to act on her behalf, but also designating in the documents who she does not want to act on her behalf.

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173. FLA. CONST. art. I, § 23.

174. *See Kazmierazak v. Query*, 736 So. 2d 106, 109–10 (Fla. 4th Dist. Ct. App. 1999).

175. *See, e.g.*, FLA. STAT. §§ 765.105, .202(7), .302(3) (2009); FLA. STAT. §§ 744.3045(4), 709.08(3)(c)1 (2009).

176. *See* 1 CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 301.1, at 96 (2009 ed., West).

177. *See id.*

178. *See supra* notes 34 & 161 and accompanying text.

179. *See* Spiegelman, *supra* note 164.

180. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289–90 (1990) (O'Connor, J., concurring).

181. *See infra* Part IV.A–C.

- Having every document notarized, even if the statutes do not require it.
- Memorializing overall agreements and long-term planning strategies (see below).
- Involving family members in the decision process to avoid surprise (see below).
- Videotaping her statement of her personal wishes and choices. It should be done in one unedited stream, correcting and clarifying any thoughts as the camera keeps running, so that no one can later say the “true thoughts” were edited out. She could make a new recording every few years to rebut an argument that her choices became “stale” over time.

B. *If the Doors Are Open: Communicate and Mediate*

Private mediation is one way to bring interested parties together to reach an understanding.<sup>182</sup> Acting as a friendly and impartial legal referee, a mediator suggests, encourages and facilitates a non-adversarial process where parties reach a voluntary mutual agreement.<sup>183</sup> “Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasize . . . *self determination* . . . .”<sup>184</sup> Although mediation is often thought of as a court-ordered strategy to resolve existing legal disputes after lawsuits have been filed, people are free to consult a mediator outside the judicial process before a dispute arises.<sup>185</sup>

In addition to expert elder law and long-term planning advice, committed couples could benefit from voluntary mediation to facilitate the decision-making related to executing the necessary documents. They could also benefit from mediation to facilitate what might be the thorny details of a cohabitation agreement.<sup>186</sup> But couples and single LGBT’s could all benefit from mediation that includes blood relatives if that door to such discussion is open.

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182. See Florida State Courts, Alternative Dispute Resolution, [http://www.flcourts.org/gen\\_public/adr/adrintro.shtml](http://www.flcourts.org/gen_public/adr/adrintro.shtml) (last visited Nov. 7, 2009).

183. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.210–.220.

184. *Id.* at 10.230 (emphasis added).

185. See Florida State Courts, Alternative Dispute Resolution, *supra* note 182.

186. See Barry Simon, *How Mediation Can Help Same Gender Relationships*, MEDIATE.COM, <http://www.mediate.com/articles/simon.cfm#> (last visited Nov. 7, 2009).

The infamous and tragic case of Terry Schiavo and the legal battle between her husband and her parents over removal of life support later sparked some health law experts to suggest hospital based “bioethics consultations.”<sup>187</sup> Specially trained hospital staff would bring family members facing a medical crisis together to discuss the tough subjects that often go unarticulated between loved ones.<sup>188</sup> Participants would not only learn about all the medical options and outcomes, but would get a chance to be emotionally heard.<sup>189</sup> By reaching consensus before hand, Schiavo-type disputes may be foreclosed later because family members, perhaps even including the patient if she is still competent, developed an agreement ahead of time.<sup>190</sup>

Like discussions of mortality, discomfort over sexuality can lead to silent misplaced assumptions. Even the most supportive families may never really discuss their son/brother/uncle’s “homosexual lifestyle”<sup>191</sup> and the very different life experience that has shaped his choices. Therefore, the idea for open discussion of end-of-life decisions translates to LGBT personal choice decisions. A traumatized mother may be even more hurt and distressed if the first time she discovers her son gave decision-making power to his partner is when that severely injured son goes wheeling by on a hospital gurney. At such painful times, otherwise reasonable people might misdirect their hurt into legal recourse.<sup>192</sup> But if a same-sex couple invited family to participate in a pre-need mediation process related to the personal choices advocated here, hurt feelings and misunderstandings could be addressed and resolved.<sup>193</sup> And while the Schiavo proposal remains a proposal, private mediation is an established process available now to LGBTs.<sup>194</sup>

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187. See Coombs, *supra* note 62, at 566.

188. See *id.* at 555, 568.

189. See *id.* at 557.

190. See *id.* at 569.

191. The author uses this term purposely since the heterosexual community is not always aware that the LGBT community does not agree with the word “lifestyle,” since it implies they made a choice to be LGBT. University of Tennessee Knoxville, LGBT Glossary, <http://lgbt.utk.edu/glossary.html> (last visited Nov. 7, 2009) (“[T]he phrase ‘homosexual lifestyle’ is often used by anti-gay groups to imply that sexual orientation is a matter of choice rather than of identity.”).

192. See Coombs, *supra* note 62, at 584.

193. See *id.* at 569.

194. Florida State Courts, Alternative Dispute Resolution, *supra* note 182.

C. *If the Doors Are Closed: A Proposal for Official Recognition*

Of course, not all LGBT's enjoy close family relationships.<sup>195</sup> Whether it is a happenstance of geography or estrangement over their daughter's "choice," it may simply be impractical or futile to engage family in a mediation process.<sup>196</sup> I propose an alternative judicial or quasi-judicial process, administered by the state. This process would allow anyone to petition for an "official stamp of approval" for her overall comprehensive long-term plan and support her constitutionally protected rights to privacy and autonomy.<sup>197</sup> The petitioner would pay a fee<sup>198</sup> to appear before a local court or administrative judge, along with the person(s) she is designating to act on her behalf if she is ever incapacitated, and any witnesses. The comprehensive plan would include validly executed copies of all the long-term planning documents and include a sworn affidavit attesting to the choices made. The judge could use a pattern set of questions to develop testimony from the parties that elicits their understanding of the choices, so that the judge could reach a conclusive opinion that those choices were sound. Notice could even be given to all pertinent family members so that they could have an opportunity to be heard. In this way, the judge might actually see and understand why someone has specifically excluded family from her proxy decisions. Or, alternatively, in "friendly family" situations, the mediation agreement discussed in the previous section could be submitted as evidence of mutual understanding of the petitioner's choices. The judge's resulting official opinion would then be kept on file and be statutorily allowed as evidence of a person's wishes in a later dispute over those wishes. Another helpful option would be to create an opportunity for easy amendment or renewal through witnessed and notarized forms so that the petitioner could re-validate her choices over time or when necessary by changes in relationships.

"Rebuttable presumptions" serve a purpose in the law: they allow the asserted truth to be tested to ensure that the "real truth" has not been covered up.<sup>199</sup> But by creating and using this proposed process, an official opinion

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195. See, e.g., *In re Guardianship of Atkins*, 868 N.E.2d 878, 880 (Ind. Ct. App. 2007).

196. See Coombs, *supra* note 62, at 561.

197. This process could be beneficial to anyone—gay, straight, married, single—who is making health care surrogate, power of attorney, or pre-need guardian choices that divert from "expected" or traditional choices.

198. With state budgets strained, the ideal solution would be to piggyback onto an existing adjudicative facility where the fees would be calculated to collectively pay for the extra labor and administrative requirements.

199. See 1 EHRHARDT, *supra* note 176, § 301.1, at 96.

could create a threshold of presumption that would be extremely difficult to overcome.

## V. CONCLUSION

The 2008 passage of Amendment 2 demonstrates that the state is a long way from embracing legislation that normalizes the legal status of same-sex relationships.<sup>200</sup> Such normalization, even if only through meaningful domestic partnership laws, or civil unions, might inspire more of Florida's single LGBTs to enter into and stay in long-term, protected relationships.<sup>201</sup> But until then, Floridian LGBTs have a number of statutory legal options to give some meaning to their intimate relationships.

The options are definitely imperfect. Anyone intent on executing a comprehensive plan to memorialize and give legal effect to his or her personal choices has to spend some money on competent, professional advice, and do a little more leg work than simply saying "I do." Anyone intent on disrupting those personal choices can institute costly and time consuming litigation under Florida law. But by executing these highly personal and autonomous documents in spite of their limitations, Florida's LGBTs can send a message: we will not have our loved ones become "legal strangers." By using mediation techniques to involve family members, and advocating for legal solutions to cement the validity of autonomous choices, perhaps Florida could shed its Anita Bryant past and serve as a role model for coping with practical LGBT realities.

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200. See FLA. CONST. art. I, § 27.

201. See Press Release, Am. Psychological Ass'n, New Research Finds Equal Level of Commitment and Relationship Satisfaction Among Same-Sex and Heterosexual Couples (Jan. 22, 2008), available at <http://www.apa.org/releases/satisfaction0108.html> (study results suggest that civil union laws influence gay couples to commit to long-term relationships).

## THE *UN*-TAXABILITY OF COMPUTER SOFTWARE AS TANGIBLE PERSONAL PROPERTY BY FLORIDA COUNTY GOVERNMENTS

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### I. INTRODUCTION

Florida's Fourth District Court of Appeal, in its recent decision in *Nikolits v. Verizon Wireless Personal Communications L.P.*,<sup>1</sup> construed Florida's Tax Code to not permit counties to tax "computer software" as tangible property.<sup>2</sup> The decision has a profound financial impact on the taxing powers of Florida county governments given the ever increasing reliance on computers and their software by people and businesses. This impact cuts even deeper due to the global recession and the State of Florida's ever increasing revenue woes. The decision, however, was in accordance with the intent of the Florida Legislature. In Part II of this article, I examine the Fourth District's decision in *Nikolits*. In Part III of this article, I will show why the decision is in accordance with the legislature's intent by examining the applicable tax statute. In my analysis, I will use as guidance the Fourth

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1. 9 So. 3d 690 (Fla. 4th Dist. Ct. App. 2009).

2. *Id.* at 694.

District's decision in *Nikolits* and a decision by the Fifth District on a similar issue in *Gilreath v. General Electric Co.*<sup>3</sup> I will also invoke the canons of statutory interpretation. Then, in Part IV of this article, I will briefly examine the definition of a "computer" and the presumption of correctness allocated to county tax appraisers, and then provide why, given that definition and the limitations on a county tax appraiser's taxing power, the Fourth District's decision was correct. Lastly, I conclude with my recommendation as to how the Florida Legislature may re-construe the applicable tax section to permit the State of Florida to benefit from taxation of computer software as intangible personal property.

## II. THE FOURTH DISTRICT'S DECISION IN *NIKOLITS*

On April 15, 2009, Florida's Fourth District Court of Appeal rendered its decision in *Nikolits*.<sup>4</sup> This case arose from Palm Beach County, in 2005, having subjected the "Wireless Services Software" of Verizon Wireless Personal Communications (Verizon) to ad valorem taxation<sup>5</sup> as tangible personal property.<sup>6</sup> Verizon paid the tax under protest, but contested the validity of the tax by bringing suit against Palm Beach County's Property Appraiser, Gary R. Nikolits (Nikolits).<sup>7</sup> After the trial court ruled in favor of Verizon, Nikolits appealed the decision,<sup>8</sup> leading to the Fourth District's decision.<sup>9</sup>

The Wireless Services Software is run on the computer system in Verizon's mobile switching center in Jupiter, Florida.<sup>10</sup> The computer system is called the *Autoplex 1000*.<sup>11</sup> "The *Autoplex* consists of a network of computers. Run on the computers are three types of software: boot software, operating system software, and the Wireless Services Software."<sup>12</sup> The Wireless Services Software enables Verizon to provide its customers with the ability to use their cell phones to make phone calls, "send text messages, operate a [mobile] GPS navigator, and browse the Internet."<sup>13</sup> While the *Autoplex* is

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3. 751 So. 2d 705 (Fla. 5th Dist. Ct. App. 2000).

4. *Nikolits*, 9 So. 3d at 691.

5. BLACK'S LAW DICTIONARY 57 (8th ed. 2004). Ad valorem taxation is taxation that is "proportional to the value of the thing taxed." *Id.*

6. *Nikolits*, 9 So. 3d at 691.

7. *See id.*

8. *Id.*

9. *Id.* at 694.

10. *Id.* at 692.

11. *Nikolits*, 9 So. 3d at 692.

12. *Id.* Only the taxability of the Wireless Service Software was at issue in *Nikolits*. *See id.*

13. *Id.*



the hardware that executes the software, the Wireless Services Software gives the *Autoplex* and Verizon the ability to provide the aforementioned services.<sup>14</sup>

In *Nikolits*, the trial court, in interpreting Florida's Tax Code, held that the Wireless Service Software fit section 192.001(19), *Florida Statutes*, definition of computer software, exempting it from taxation.<sup>15</sup> The trial court also found that the Wireless Services Software did not fall within section 192.001(19)'s "embedded software" exception.<sup>16</sup> If it had, the Wireless Service Software would have been subject to taxation.<sup>17</sup> Section 192.001(19) states:

(19) "Computer software" means any information, program, or routine, or any set of one or more programs, routines, or collections of information used or intended for use to convey information or to cause one or more computers or pieces of computer-related peripheral equipment, or any combination thereof, to perform a task or set of tasks. Without limiting the generality of the definition provided in this subsection, the term includes operating and applications programs and all related documentation. *Computer software does not include embedded software that resides permanently in the internal memory of a computer or computer-related peripheral equipment and that is not removable without terminating the operation of the computer or equipment. Computer software constitutes personal property only to the extent of the value of the unmounted or uninstalled medium on or in which the information, program, or routine is stored or transmitted, and, after installation or mounting by any person, computer software does not increase the value of the computer or computer-related peripheral equipment, or any combination thereof.*<sup>18</sup>

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14. *Id.* In *Nikolits*, the Fourth District described in greater detail the nature of the Wireless Service Software, stating that:

The Wireless Service Software itself consists of approximately 1000 separate programs. Ten percent of these programs are needed for basic call processing. The other programs are used for various diagnostic tools, various report generators, and as tools to verify that the software has been installed properly. This means the Autoplex system will still process voice calls even if up to ninety percent of the Wireless Services Software is uninstalled. If all of the Wireless Services Software is uninstalled, the Autoplex processing system would still be up and running, and one could still read e-mail and do those kinds of things on those computers using the tools that come with the operating system.

*Nikolits*, 9 So. 3d at 692.

15. *Id.* (interpreting FLA. STAT. § 192.001(19) (2009)).

16. *Id.*

17. *Id.*

18. FLA. STAT. § 192.001(19) (emphasis added).

On appeal, the Fourth District, in spite of a strong argument to the contrary, affirmed the trial court.<sup>19</sup> It also held that the Wireless Services Software “is intangible personal property and is therefore outside of the taxing power of Palm Beach County.”<sup>20</sup> In so holding, it cited to the Florida Constitution, as well as to the Fifth District’s decision in *Gilreath*, stating that:

Under the Florida Constitution, local governments and counties have the power “to levy and collect ad valorem taxes on real property and tangible personal property. The power to tax intangible personal property, however, is reserved only to the State.” As such, “if the [computer] software is intangible personal property, the County was without authority to assess or collect taxes on it.”<sup>21</sup>

### III. AS INTENDED BY THE FLORIDA LEGISLATURE, “COMPUTER SOFTWARE” IS INTANGIBLE PERSONAL PROPERTY AND NOT TAXABLE BY FLORIDA COUNTY GOVERNMENTS

Section 196.001 states that “[a]ll real and personal property” is property subject to taxation, unless expressly exempted.<sup>22</sup> The Florida Constitution provides that local governments and counties may assess ad valorem taxation on tangible personal property, but not on intangible personal property, as taxation on intangible property is reserved to the State.<sup>23</sup> The Fourth District Court of Appeal found that Palm Beach County could not tax the Wireless Services Software because, as “computer software,” it is intangible personal property and “not taxable by Palm Beach County.”<sup>24</sup> I agree with this holding, as the Florida Legislature intended that courts treat “computer software” not as tangible personal property, but rather, as intangible personal property.<sup>25</sup>

This issue involves a matter of statutory interpretation, namely whether the legislature, through section 192.001, intended to treat “computer software” as tangible or intangible personal property.<sup>26</sup> As such, the *de novo*

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19. *Nikolits*, 9 So. 3d at 694.

20. *Id.* at 693.

21. *Id.* (quoting *Gilreath v. Gen. Elec. Co.*, 751 So. 2d 705, 707–08 (Fla. 5th Dist. Ct. App. 2000)) (citations omitted) (alteration in original); *see also* FLA. CONST. art. VII, §§ 1(a), 9(a).

22. FLA. STAT. § 196.001(1) (2009).

23. FLA. CONST. art. VII, §§ 1(a), 9(a).

24. *Nikolits*, 9 So. 3d at 694.

25. *See id.*; *see also* FLA. STAT. § 192.001(19) (2009).

26. *See* FLA. STAT. § 192.001(19).

standard of review is applied by an appellate court,<sup>27</sup> which “simply means the appellate court is free to decide the question of law, without deference to the trial judge, as if the appellate court had been deciding the question in the first instance.”<sup>28</sup>

“‘[L]egislative intent is the polestar’” of statutory interpretation.<sup>29</sup> To determine such intent, an appellate court must first look to a statute’s plain language.<sup>30</sup> If “the statute is clear and unambiguous, ‘there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.’”<sup>31</sup> However, “[i]f the meaning of a statutory provision is deemed ambiguous, it must be subject to judicial construction.”<sup>32</sup> The purpose of the rules of statutory construction “is to discover the true intention of the law. But such rules are useful only in case of doubt and should never be used to create doubt, only to remove it.”<sup>33</sup>

Amongst the rules of construction used by courts to rectify an ambiguity is that remedial statutes are “liberally construed to advance the intended remedy.”<sup>34</sup> A remedial statute is broadly defined as a statute “intended to fix an existing problem.”<sup>35</sup> Another principle of statutory construction is that “tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer.”<sup>36</sup> In construing statutes, appellate courts will also read “‘all parts of a statute . . . together in order to achieve a consistent whole.’”<sup>37</sup> “Further, in construing a statute that is susceptible to more than one interpre-

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27. See *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004) (“Although we take into consideration the district court’s analysis on the issue, constitutional interpretation, like statutory interpretation, is performed de novo.”).

28. 2 PHILIP J. PADOVANO, *FLORIDA APPELLATE PRACTICE* § 18:4, at 339–40 (West 2009).

29. *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1082 (Fla. 2009) (per curiam) (quoting *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004) (per curiam)).

30. *Id.* (citing *McKenzie Check Advance of Fla., L.L.C. v. Betts*, 928 So. 2d 1204, 1208 (Fla. 2006)).

31. *Id.* (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

32. *Gulfstream Park Racing Ass’n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006).

33. *State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973).

34. *Educ. Dev. Ctr., Inc. v. Palm Beach County*, 751 So. 2d 621, 623 (Fla. 4th Dist. Ct. App. 1999).

35. RONALD BENTON BROWN & SHARON JACOBS BROWN, *STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT* 60 (2002).

36. *Leadership Hous., Inc. v. Dep’t of Revenue*, 336 So. 2d 1239, 1242 (Fla. 4th Dist. Ct. App. 1976) (quoting *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967)).

37. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

tation, it is often helpful to refer to legislative history in order to ascertain the Legislature's intent."<sup>38</sup>

As the *Laws of Florida* may impact an appellate court's analysis of a statute, a discussion of its purpose and make-up is warranted. The Florida Senate, in its Glossary of Terms, defines the *Laws of Florida* as:

A verbatim publication of the general and special laws enacted by the Florida Legislature in a given year and published each year following the regular session of the legislature. It presents the laws in the order in which they are numbered by the Secretary of State, as well as resolutions and memorials passed by the legislature.<sup>39</sup>

The Florida Constitution also requires that every law has an "enacting clause" that reads: "Be It Enacted by the Legislature of the State of Florida."<sup>40</sup> Furthermore, although the *Laws of Florida* contain the provisions of a bill, the legislature provided before the enacting clauses—i.e., the preamble or prefatory language—of the *Florida Statutes*, as "official statute law of the state immediately upon publication,"<sup>41</sup> do not. This is because "[a] preamble to a statute is an introductory or prefatory clause, preceding the enacting clause, supplying the reasons and explanations for legislative enactments. It is not part of a statute itself and has no substantive legal force and so cannot, by itself, prescribe rights or establish duties."<sup>42</sup> As such, prefatory matters stated before the enacting clause in the *Laws of Florida* are not included in the *Florida Statutes* because they are not part of the official statutory law of the state.<sup>43</sup> Rather, this language may offer guidance for a court when a statute's plain meaning is ambiguous, as "preambles and findings and purposes clauses can help resolve ambiguity" because they are relevant to a statute's meaning.<sup>44</sup>

As stated in *Nikolits*, the *Florida Statutes*, via subsection 192.001(19), provides a definition of "computer software."<sup>45</sup> In that definition, "computer

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38. State v. Jefferson, 758 So. 2d 661, 665 (Fla. 2000).

39. The Florida Senate: Glossary of Terms, [http://www.flsenate.gov/Info\\_Center/index.cfm?Mode=Glossary&Submenu=3&Tab=info\\_center&CFID=86199434&CFTOKEN=34982315](http://www.flsenate.gov/Info_Center/index.cfm?Mode=Glossary&Submenu=3&Tab=info_center&CFID=86199434&CFTOKEN=34982315) (last visited Nov. 7, 2009).

40. FLA. CONST. art. III, § 6.

41. See FLA. STAT. § 11.2421 (2009).

42. 48A FLA. JUR. 2D *Statutes* § 57 (2007).

43. See *id.*

44. LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 125 (2008).

45. *Nikolits v. Verizon Wireless Pers. Commc'ns, L.P.*, 9 So. 3d 690, 692 (Fla. 4th Dist. Ct. App. 2009).

software” is defined as “personal property,” but not as either tangible or intangible personal property.<sup>46</sup> In the same statutory section, the *Florida Statutes* define tangible and intangible personal property, whose definitions fail to include “computer software.”<sup>47</sup> The statute’s wording is, accordingly, ambiguous as to whether “computer software” is tangible or intangible personal property, and the canons of construction may be invoked.

It is feasible that because the legislature included a definition of “computer software” and tangible or intangible personal property, neither of which expressly defines “computer software” as intangible personal property, the legislature did not intend for “computer software” to be categorized as intangible personal property. “Computer software,” however, is intangible personal property because a close examination of legislative intent affords this result.<sup>48</sup>

In first turning to the plain language of section 192.001, one may determine that the Florida Legislature intended that “computer software” is not tangible personal property.<sup>49</sup> As articulated by the Fourth District Court of Appeal in *Nikolits*:

A close examination of the definition of tangible personal property contained in section 192.001 compels the same result [as the Fifth District reached in *Gilreath*]. In particular, that definition states that tangible personal property is “all goods, chattels, and

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46. FLA. STAT. § 192.001(19) (2009).

47. FLA. STAT. § 192.001(11)(b), (d). For purposes of taxation, the Florida Legislature has provided the following definitions of tangible personal property and intangible personal property:

(b) “Intangible personal property” means money, all evidences of debt owed to the taxpayer, all evidences of ownership in a corporation or other business organization having multiple owners, and all other forms of property where value is based upon that which the property represents rather than its own intrinsic value.

....

(d) “Tangible personal property” means all goods, chattels, and other articles of value (but does not include the vehicular items enumerated in s. 1(b), Art. VII of the State Constitution and elsewhere defined) capable of manual possession and whose chief value is intrinsic to the article itself. “Construction work in progress” consists of those items of tangible personal property commonly known as fixtures, machinery, and equipment when in the process of being installed in new or expanded improvements to real property and whose value is materially enhanced upon connection or use with a preexisting, taxable, operational system or facility. Construction work in progress shall be deemed substantially completed when connected with the preexisting, taxable, operational system or facility. Inventory and household goods are expressly excluded from this definition.

*Id.*

48. See FLA. H.R. COMM. ON CMTY. AFFAIRS, HB 1723 (1997) BILL ANALYSIS & ECONOMIC IMPACT STATEMENT 1 (Apr. 15, 1997) [hereinafter HB 1723 BILL ANALYSIS & ECONOMIC IMPACT STATEMENT].

49. See FLA. STAT. § 192.001(11)(d).

other articles of value . . . capable of manual possession and whose chief value is intrinsic to the article itself.” § 192.001(11)(d). Although computer software’s value is intrinsic in and of itself, as the “essence of the property is the software itself, and not the tangible medium on which the software might be stored,” *Gilreath*, 751 So. 2d at 708, it is property incapable of manual possession. This is because, software, itself, is “not capable of being ‘seen, weighed, measured, felt or otherwise perceived by the senses.’” *Id.* (quoting *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 122 (Tex. App. 1996)). Rather, the tangible medium on which it is transported and transmitted is the means by which the property is manually possessed.

Therefore, we . . . hold that “computer software” is intangible personal property. As such, we affirm the trial court’s decision that the Wireless Services Software is not taxable by Palm Beach County, as it is intangible personal property, which is property outside a county’s taxing authority.<sup>50</sup>

Furthermore, in examining the prefatory language of the 1997 *Laws of Florida*, one can discern the legislative intent to treat “computer software” as intangible personal property.<sup>51</sup> Specifically, although this provision was not included in the subsequent *Florida Statutes* because it appeared before the enacting clause, the 1997 *Laws of Florida* state that it is “the intent of the Legislature to clarify that computer software, as defined in this act, is not tangible personal property under the ad valorem tax laws of this state.”<sup>52</sup> In using this language as guidance, one can logically conclude that because the legislature stated that “computer software” is not tangible, it intended it to be categorized as intangible. This is because “[f]or purposes of ad valorem taxation, personal property is divided into” intangible personal property or tangible personal property.<sup>53</sup> As such, if computer software is not tangible it must logically be intangible.

The prefatory language in the *Laws of Florida* also states that it is the “intent of the Legislature that the provisions of this act are remedial.”<sup>54</sup> An interpretation of “computer software” as intangible personal property adheres to the rule of construction for remedial statutes because, to do so, is to liberally construe the statute to achieve its perceived remedial purpose of tax re-

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50. *Nikolits*, 9 So. 3d at 694.

51. See Act effective June 1, 1997, ch. 97-294, 1997 Fla. Laws 5333, 5333 (codified at FLA. STAT. §§ 192.001, 196.012, .195-.196 (2009)).

52. Ch. 97-294, 1997 Fla. Laws at 5333.

53. 50 FLA. JUR. 2D *Taxation* § 80 (2006).

54. Ch. 97-294 1997 Fla. Laws at 5333.

lief.<sup>55</sup> The legislature's intent to provide tax relief by way of section 192.001(19) is embodied in a 1997 Florida House of Representative's Committee Report for House Bill 1723, which states that section 192.001(19)'s definition of "computer software" was designed to "effectively remove[] the value of software, except for the value of the diskette or other medium on which the information is stored, from ad valorem taxation."<sup>56</sup> Moreover, an interpretation of "computer software" as intangible personal property is in accordance with the rule of construction that tax statutes are interpreted in favor of the taxpayer, as such an interpretation grants the taxpayer relief.<sup>57</sup>

Additionally, this interpretation is in accord with the Fifth District Court of Appeal's decision in *Gilreath v. General Electric Co.*<sup>58</sup> In *Gilreath*, the Fifth District rendered a decision on the same question discussed in this issue, i.e., whether computer software under section 192.001(19) is tangible or intangible personal property.<sup>59</sup> In that case, the court examined section 192.001(19), noting that the definition

made a sharp distinction between the information, program or routine (the "imperceptible binary impulses"), and the medium on which the information, program or routine is carried. That is to say, as the court interprets this amendment, the Legislature determined that the disk or tape itself was tangible personal property, but the information, program or routine was not. The remainder of the statute clearly indicates that the information, program or routine is not subject to local taxation, because it "does not increase the value of the computer or computer-related peripheral equipment, or any combination thereof."<sup>60</sup>

More importantly, the court also held that "the fact that tangible property is used to store or transmit the software's binary instructions does not change the character of what is fundamentally a classic form of intellectual property" that is, in fact, "intangible property."<sup>61</sup> As such, "computer software" is, itself, intangible property, regardless of its present status under the *Florida Statutes* and, therefore, is subject to taxation as intangible personal

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55. See BROWN & BROWN, *supra* note 35, at 59.

56. HB 1723 BILL ANALYSIS & ECONOMIC STATEMENT, *supra* note 48, at 1 (emphasis added).

57. See BROWN & BROWN, *supra* note 35, at 59–60.

58. See *Gilreath v. Gen. Elec. Co.*, 751 So. 2d 705, 706 (Fla. 5th Dist. Ct. App. 2000).

59. *Id.* at 707.

60. *Id.* at 708–09.

61. *Id.* at 709 (quoting *Ne. Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 691 (Conn. 1989)).

property by the State of Florida—not Florida county governments—if the legislature so provides.<sup>62</sup>

Thus, in accordance with the intent of the Florida Legislature, the Fourth District's holding in *Nikolits* was correct in its finding that “computer software” was not taxable by Palm Beach County because it was not tangible personal property, but rather intangible personal property.<sup>63</sup>

#### IV. THE FOURTH DISTRICT'S DECISION WAS CORRECT GIVEN THE DEFINITION OF A COMPUTER AND THE FACT THAT A PRESUMPTION OF CORRECTNESS WAS NOT APPLICABLE TO THE PROPERTY APPRAISER'S FINDINGS

Another compelling question is whether the Fourth District Court of Appeal acted improperly by not interpreting the word “computer” in favor of the taxing authority and not giving a presumption of correctness to the Property Appraiser's findings.<sup>64</sup> As in Issue III, whether the trial court properly interpreted the word computer in section 192.001(19) is a matter of statutory interpretation that an appellate court reviews *de novo*.<sup>65</sup>

A rule of statutory construction is that “[w]hile doubtful language in taxing statutes should be resolved in favor of the taxpayer, *the reverse is applicable in the construction of exceptions and exemptions from taxation.*”<sup>66</sup> This, however, is a rule of construction, which is not applicable if a term is unambiguous.<sup>67</sup> As such, it “is inapplicable to construe language of a statute that is not doubtful.”<sup>68</sup> This is in accordance with the principle that, absent an ambiguity or a statutory definition, the wording of a statute is given its plain and ordinary meaning.<sup>69</sup> It is also assumed that a legislative body knows the plain and ordinary meanings of the words it uses.<sup>70</sup> A word's plain meaning is “ascertained by reference to a dictionary.”<sup>71</sup>

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62. *Id.*

63. See *Nikolits v. Verizon Wireless Pers. Commc'ns L.P.*, 9 So. 3d 690, 693 (Fla. 4th Dist. Ct. App. 2009).

64. See *id.*

65. *Am. Honda Motor Co. v. Cerasani*, 955 So. 2d 543, 545 (Fla. 2007) (emphasis added).

66. *Markham v. PPI, Inc.*, 843 So. 2d 922, 925 (Fla. 4th Dist. Ct. App. 2003) (quoting *Robbins v. Yusem*, 559 So. 2d 1185, 1187 (Fla. 3d Dist. Ct. App. 1990)).

67. *Id.*

68. *Id.*

69. *Sieniarecki v. State*, 756 So. 2d 68, 75 (Fla. 2000).

70. *Hankey v. Yarian*, 755 So. 2d 93, 96 (Fla. 2000).

71. *Sieniarecki*, 756 So. 2d at 75 (quoting *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992)).



It is feasible to argue that the meaning of the word “computer” used in the definition of “computer software” is ambiguous, and because section 192.001(19) is a tax exemption, it should have been translated in favor of the taxing authority.<sup>72</sup> However, the Florida Legislature provided a definition of the term “computer software”—not “computer.”<sup>73</sup> The meaning of the term computer, itself, is accordingly unambiguous because it is a word with a plain and ordinary meaning ascertainable by reference to a dictionary, i.e., “a high-speed electronic device that processes, retrieves, and stores programmed information.”<sup>74</sup> Hence, there is no doubt or ambiguity as to the plain meaning of the term “computer,” making the rules of construction inapplicable.

If an appellate court, however, did find an ambiguity regarding the definition of the term “computer,” it should still interpret it in favor of the taxpayer. This is because the rule of construction requiring a court to strictly construe a tax statute as against the taxpayer is “applicable in the construction of exceptions and exemptions from taxation,”<sup>75</sup> but not tax exclusions, with section 192.001(19) being a tax exclusion and not a tax exemption.<sup>76</sup> An examination of the Second District’s decision in *Department of Revenue v. GTE Mobilnet of Tampa Inc.*,<sup>77</sup> shows why section 192.001(19) is a tax exclusion.<sup>78</sup>

In that case, at issue was whether certain language in the definition of “telecommunication service” was a tax exemption or tax exclusion.<sup>79</sup> The Second District held that because the wording was “part of the statutory definitions that determine what comes within the tax imposition language,” it operates not as an exemption, but as an exclusion.<sup>80</sup> The court held that this was because the tax definition operated to exclude “telecommunication service” from taxation by placing it outside the tax statute.<sup>81</sup>

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72. See FLA. STAT. § 192.001(19) (2009).

73. See *id.*

74. WEBSTER’S NEW COLLEGE DICTIONARY 231 (1995).

75. *PPI, Inc.*, 843 So. 2d at 925 (quoting *Robbins v. Yusem*, 559 So. 2d 1185, 1187 (Fla. 3d Dist. Ct. App. 1990) (emphasis omitted)).

76. See *Dep’t of Revenue v. GTE Mobilnet of Tampa Inc.*, 727 So. 2d 1125, 1128 (Fla. 2d Dist. Ct. App. 1999). “A tax exemption, [generally] is a statute that carves out a statutory exception for something that otherwise would be within the scope of the taxing statute.” *Id.* By contrast, a tax exclusion is property that is not taxable because it is excluded from the tax statute. See *id.*

77. *Id.* at 1125.

78. See *id.* at 1128.

79. *GTE Mobilnet of Tampa Inc.*, 727 So. 2d at 1127–28.

80. *Id.* at 1128.

81. *Id.*

Comparatively, the definition of “computer software” is a tax exclusion because, like the definition of “telecommunication services” in *GTE Mobilnet of Tampa Inc.*, the definition of computer software is part of statutory definitions that determine what comes within a tax statute.<sup>82</sup> Also, like the definition of “telecommunication service” in *GTE Mobilnet of Tampa Inc.*, the definition of “computer software” excludes it from taxation by placing it outside the taxing statute.<sup>83</sup> In particular, section 192.001(19) states that if software meets the definition of “computer software,” and does not fit into the “embedded software” exception, it is “personal property only to the extent of the value of the unmounted or uninstalled medium.”<sup>84</sup> This places computer software outside the tax statute because, as provided by the legislature, only “real and personal property” is subject to taxation,<sup>85</sup> and “computer software” is not personal property for the purposes of taxation.<sup>86</sup>

Therefore, even if a court finds that the term “computer” raises an ambiguity, it is still correct in interpreting the statute in favor of the taxpayer because section 192.001(19) is a tax exclusion—not a tax exemption.<sup>87</sup>

One may further argue that the Fourth District erred in its decision by not cloaking with a presumption of correctness the Property Appraiser’s findings that the Wireless Services Software was taxable as tangible personal property.<sup>88</sup> I disagree, because Palm Beach County’s Tax Appraiser misapplied the law by taxing intangible personal property as tangible personal property.

It is a well-established rule that “[t]ax assessors are constitutional officers and as such their actions are clothed with the presumption of correctness. One asserting error on the part of the tax assessor must show by ‘proof’ that every reasonable hypothesis has been excluded which would support the tax assessor.”<sup>89</sup> If “the presumption of correctness should have been but was not applied by the trial court,” an appellate court may reverse the trial court’s findings.<sup>90</sup> This presumption, however, does not apply if “the Property Appraiser’s assessment . . . was based on a misapplication of the law.”<sup>91</sup>

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82. *Id.* at 1126–27.

83. *See id.* at 1126–28.

84. FLA. STAT. § 192.001(19) (2009).

85. FLA. STAT. § 196.001(1) (2009).

86. *See* FLA. STAT. § 192.001(19).

87. *See id.*; *see also GTE Mobilnet of Tampa Inc.*, 727 So. 2d at 1128.

88. *See Nikolits v. Verizon Wireless Pers. Commc’ns L.P.*, 9 So. 3d 690, 693 (Fla. 4th Dist. Ct. App. 2009).

89. *Straughn v. Tuck*, 354 So. 2d 368, 371 (Fla. 1977) (citing *Powell v. Kelly*, 223 So. 2d 305, 308 (Fla. 1969)).

90. *See Markham v. June Rose*, 495 So. 2d 865, 866 (Fla. 4th Dist. Ct. App. 1986).

91. *See Wilkinson v. Kirby*, 654 So. 2d 194, 196 (Fla. 2d Dist. Ct. App. 1995).

In *Nikolits*, the presumption of correctness was not applicable.<sup>92</sup> This is because the Property Appraiser, by taxing intangible personal property as tangible personal property, misapplied the tax statute.<sup>93</sup> Accordingly, the trial court did not err by not giving a presumption of correctness to the Property Appraiser's findings. Therefore, because the trial court acted properly in not construing section 192.001 against Verizon, and not cloaking the Property Appraiser's findings with a presumption of correctness, the Fourth District was correct in its holding.<sup>94</sup>

## V. CONCLUSION

Although a Florida county government would profit from taxing "computer software" as tangible property—as exemplified in the one million dollar loss to Palm Beach County due to the *Nikolits* decision<sup>95</sup>—the Florida Legislature has intended otherwise.<sup>96</sup> Given Florida's strict separation of powers scheme,<sup>97</sup> the Fourth District's decision correctly discerned and interpreted the intent of the legislature. If it ruled to the contrary, it would have encroached into the providence of the legislature by misconstruing and misapplying the law in a way that the legislature did not intend.<sup>98</sup>

I do, however, recognize the importance and necessity of taxation to an orderly form of government. Although "computer software" is not taxable as tangible property, it may be taxable by the State as intangible personal property. To do so, I recommend that the legislature expressly provide for this in the definition of "computer software" by stating that "computer software" is taxable as intangible personal property if it fits within the embedded software exception. This will also definitively label section 192.001(19) a tax exemption by showing that computer software is in fact subject to taxation as personal property, but is otherwise exempt from taxation under section 192.001(19) unless it falls within that exemption's embedded software ex-

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92. See *Nikolits*, 9 So. 3d at 693.

93. *Id.*

94. See *id.*

95. Billy Shields, *Verizon Avoids \$1 Million Palm Beach County Bill*, BROWARD DAILY BUS. REV., Apr. 16, 2009, at A3.

96. See *id.*

97. *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000) ("This Court, on the other hand, in construing the Florida Constitution, has traditionally applied a strict separation of powers doctrine.").

98. See FLA. CONST. art. II, § 3 (enumerating Florida's strict separation of powers scheme by stating: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

ception.<sup>99</sup> Furthermore, it will bring within the State's taxing power the delineated ability to tax a form of intangible property that now lingers outside Florida's Tax Code, helping generate revenue for the State from a viable tax source.

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99. See FLA. STAT. § 192.001(19) (2009).

## SEMINOLE GAMING COMPACT PART II: WHETHER SENATE BILL 788 SATISFIES THE COMPACT PROCESS REQUIREMENTS AS WRITTEN

MATTHEW G. STRUBLE\*

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## I. INTRODUCTION

On May 8, 2009, the Florida Legislature approved Senate Bill 788.<sup>1</sup> The bill would grant the Seminole Indian Tribe of Florida (Seminole Tribe) the right to operate casino style gambling, in exchange for \$2.2 billion paid to the State of Florida over fifteen years.<sup>2</sup> Faced with a rapidly approaching deadline, the success of Senate Bill 788 remained unclear as of August 1, 2009, due to the various requirements the bill must satisfy.<sup>3</sup> First, Florida Governor, Charles Crist, has to negotiate the compact with the tribe.<sup>4</sup> If negotiations are successful, the deal would still have to be approved by the Florida Legislature and the federal government.<sup>5</sup> Similar to the events that took place during the failed compact of 2007,<sup>6</sup> “[f]ederal officials have threatened to step in and set rules for the tribe if the state fails to act. In that case, the state would get nothing from the tribe.”<sup>7</sup>

The difficulty in having Senate Bill 788 enacted represents how complex negotiating a gaming compact can be.<sup>8</sup> In 1979, the first bingo parlor operating on a reservation was opened by the Seminole Tribe.<sup>9</sup> The Seminole Tribe first sought to negotiate a compact permitting Class III gaming beginning in 1991.<sup>10</sup> Seventeen years after the first compact negotiation and after four different governors entered office in Florida, a compact allowing Class III gaming still has not been solidified.<sup>11</sup>

Reminiscent of the 2007 failed compact, it appears that the requirements that must be met to finalize Senate Bill 788 will once again result in a substantial amount of litigation.<sup>12</sup> According to the Seminole Tribe’s attorney, the compact as currently written lacks the granting of exclusive gaming

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1. Mary Ellen Klas, *New Deal on Gambling OK’d*, MIAMI HERALD, May 9, 2009, at B1.

2. *Id.*

3. *See id.*

4. Dara Kam, *Gaming Deal Needs Revise, Lawyer Says*, PALM BEACH POST, June 13, 2009, at B1 [hereinafter Kam, *Gaming Deal*].

5. *Id.*

6. Fla. House of Representatives v. Crist, 999 So. 2d 601, 605 (Fla. 2008). The Department “urged Governor Crist to negotiate a compact, warning that if a compact was not signed by November 15, 2007, the Department would finally issue procedures.” *Id.*

7. Kam, *Gaming Deal*, *supra* note 4.

8. *See* Ron M. Rosenberg, *When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona-Pima Maricopa Gaming Compact*, 4 HARV. NEGOT. L. REV. 283, 289 (1999).

9. *Id.* at 287.

10. Crist, 999 So. 2d at 605.

11. *See id.*

12. *See* Kam, *Gaming Deal*, *supra* note 4.

rights to the Seminole Tribe as required by federal law.<sup>13</sup> Considering the complicated process which must be followed before a compact can be reached,<sup>14</sup> this article will evaluate whether Senate Bill 788 satisfies the compact requirements imposed by Florida and federal law.

Part II of this article will discuss the law that applies to the type of gaming contained in Senate Bill 788. Part III is an analysis of the compact process and the important issues which are raised when a tribe wants to conduct gaming that requires state approval. Part IV evaluates the failed 2007 compact, and applies the compact process to Senate Bill 788. Finally, part V determines whether Senate Bill 788 satisfies the complex compact requirements.

## II. INDIAN GAMING GENERALLY

Indian gaming produces over twenty-six billion dollars in revenues a year.<sup>15</sup> Over 200 tribes operate the 400 Indian gaming establishments that exist in the United States.<sup>16</sup> Considering the substantial potential for revenue, it is not surprising that the process a tribe must go through in order to receive gaming rights is competitive, highly politicized, and often vigorously disputed.<sup>17</sup> Further complicating this procedure are jurisdictional and sovereignty issues.<sup>18</sup> The Indian Commerce Clause of the United States Constitution specifies that only Congress can supersede Indian sovereignty on Indian owned lands.<sup>19</sup> Therefore, to determine whether an Indian tribe can conduct gaming in a state, the rules promulgated by the federal government must be examined.<sup>20</sup>

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13. *Id.*

14. See Rosenberg, *supra* note 8, at 289.

15. NAT'L INDIAN GAMING COMM'N, TRIBAL GAMING REVENUES 2007–2008, available at <http://64.38.12.138/docs/nigc/nigc060309.pdf>.

16. Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 MARQ. L. REV. 971, 973 (2007) [hereinafter Rand, *Tribal Influence*].

17. See *id.* at 972.

18. See Rebecca S. Lindner-Cornelius, Comment, *The Secretary of the Interior as Referee: The States, the Indian Nations, and How Gambling Lead to the Illegality of the Secretary of the Interior's Regulations in 25 C.F.R. § 291*, 84 MARQ. L. REV. 685, 685–86 (2001) (“Federal Indian law is one of the most complex and dynamic areas of law in the United States.”).

19. See U.S. CONST. art. I, § 8, cl. 3.

20. Lindner-Cornelius, *supra* note 18, at 688 (“The states have a limited role in tribal relationships. The federal government preempts state power in almost all situations.”).

### A. *Indian Gaming Regulatory Act*

Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988, which created a statutory framework for Indian gaming.<sup>21</sup> The purpose of IGRA is stated as “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments.”<sup>22</sup> During the late 1980s, the vast majority of Native Americans living on reservations faced extreme poverty.<sup>23</sup> Therefore, gaming was considered a method for allowing the tribes to become less dependent on government funding, and promote economic self-determination.<sup>24</sup> Because Congress was attempting to promote economic independence among the tribes while also preserving the states’ role regulating gaming, IGRA is “[w]idely regarded as a political compromise.”<sup>25</sup> The result is a complex procedure set forth to grant gaming rights to tribes, which is limited by the states’ right to control certain types of gaming.<sup>26</sup> The states power to regulate gaming on Indian land is determined by the class of gaming, because each class raises separate jurisdictional issues.<sup>27</sup>

### B. *Indian Gaming Jurisdiction*

IGRA separates gaming into three categories.<sup>28</sup> Class I gaming includes social games that are played only for a prize of nominal value.<sup>29</sup> It also includes traditional tribal gambling, including celebrations and ceremonies.<sup>30</sup>

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21. See 25 U.S.C. §§ 2701–21 (2006).

22. 25 U.S.C. § 2702(1).

23. Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 53 (2002) [hereinafter Rand, *Pequots*]. Native Americans “were poor, unemployed, and living in overcrowded and inadequate housing in communities with minimal government services.” *Id.*

24. See Nicholas S. Goldin, Note, *Casting a New Light on Tribal Casinos Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 812–13 (1999).

25. Rand, *Pequots*, *supra* note 23, at 52.

26. See Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 211 (1997). “The act explicitly views gaming ‘as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.’ Nevertheless, state interests in Indian gaming received considerable deference in the drafting of the regulation.” *Id.* (quoting 25 U.S.C. § 2702(1) (1994)).

27. See 25 U.S.C. § 2710(a), (d) (2006).

28. *Id.* § 2703(6)–(8).

29. *Id.* § 2703(6).

30. *Id.*; see also Henderson, *supra* note 26, at 205 (“American Indians, prior to European contact, participated in a multitude of games and gaming activities. Gambling figured prominently . . . and was an important social activity.”).



Class I gaming cannot be controlled by federal or state government because tribes have the exclusive right to regulate this form of gaming.<sup>31</sup> Class II gaming excludes games that are not banked, electronic, or slot machines.<sup>32</sup> Therefore, Class II gaming predominately consists of bingo and card games that are either, “explicitly authorized by the laws of the State, or are not explicitly prohibited by the laws of the State and are played at any location in the State.”<sup>33</sup> Tribes maintain the jurisdiction to regulate Class II gaming, subject to the federal government’s approval.<sup>34</sup> Finally, Class III gaming is defined by exclusion as “all forms of gaming that are not [C]lass I gaming or [C]lass II gaming.”<sup>35</sup> Class III, which is the most profitable, consists of “high stakes, casino-style gambling—slot machines, blackjack, craps, parimutuel wagering and lotteries.”<sup>36</sup> Before a tribe can conduct Class III gaming, there are several requirements which must be satisfied.<sup>37</sup>

Although a tribe must satisfy statutory requirements before it can conduct Class III gaming, the state still does not have jurisdiction to enforce its gaming laws on tribal land absent a compact.<sup>38</sup>

It is true that, under § 1166(a), all state Class III gambling laws “apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.” But in the same breadth, Congress granted the United States exclusive jurisdiction to enforce those state laws.<sup>39</sup>

Although the states do not have jurisdiction to enforce their gaming laws absent a compact, their laws remain applicable because the act also acknowledges state interests.<sup>40</sup> Therefore, before a tribe can conduct Class III gaming, the requirements set forth in IGRA must be satisfied.<sup>41</sup>

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31. See 25 U.S.C. § 2710(a)(1).

32. *Id.* § 2703(7)(B).

33. *Id.* § 2703(7)(A)(ii)(I)–(II).

34. *Id.* § 2710(b)(1)(A).

35. *Id.* § 2703(8).

36. Rosenberg, *supra* note 8, at 289.

37. See 25 U.S.C. § 2710(d).

38. See *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 543–44 (9th Cir. 1994) (holding the state did not have jurisdiction to prosecute a tribe for conducting gaming on a reservation).

39. *Id.* at 541 (quoting 18 U.S.C. § 1166(d) (2006)).

40. See 25 U.S.C. § 2701(5).

41. See *id.* § 2710(d)(1)(A)–(B).

### C. *Obtaining Class III Gaming*

Because Class III gaming is the most profitable, it is the most disputed form of gaming, and invokes a delicate balance between the state's power to regulate, and the tribe's sovereign rights.<sup>42</sup> Therefore, IGRA specifies three requirements for Class III gaming to lawfully be conducted on Indian land.<sup>43</sup> First, the gaming must be authorized by the tribe pursuant to an ordinance or resolution.<sup>44</sup> Second, the state the tribe wishes to conduct gaming in must permit "such gaming for any purpose, by any person organization, or entity."<sup>45</sup> Third, the state and the Indian tribe must enter into a compact which permits the gaming activity.<sup>46</sup> These complex set of rules were "the result of a congressional compromise between the demands of state and tribal governments."<sup>47</sup> While each of these requirements present their own issues, the compact process is particularly complex.<sup>48</sup>

#### 1. Prohibited Versus Permitted

A tribe's right to seek Class III gaming is contingent on the activity being "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."<sup>49</sup> A state has the power to prohibit Class III gaming on Indian land, but only if the same restriction applies everywhere in the state without an exception.<sup>50</sup> Therefore, a tribe's right to pursue Class III gaming depends on whether or not the gaming is prohibited in the state.<sup>51</sup>

When looking to enforce the state gaming laws on tribal land, the federal government will apply the law "in the same manner and to the same extent as such laws [would] apply elsewhere in the [s]tate."<sup>52</sup> When the federal government determines what type of gambling is legal in the state, it must decide whether the state prohibits Class III gaming.<sup>53</sup> While a state can pro-

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42. See Rand, *Pequots*, *supra* note 23, at 52.

43. 25 U.S.C. § 2710(d)(1)(A)(i)–(iii).

44. *Id.* § 2710(d)(1)(A).

45. *Id.* § 2710(d)(1)(B).

46. *Id.* § 2710(d)(1)(C).

47. Joe Laxague, Note, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS. 77, 80 (1999).

48. See Rosenberg, *supra* note 8, at 289–90.

49. 25 U.S.C. § 2701(5).

50. See *LAC du Flambeau Band of Lake Superior Chippewa Indians v. State*, 770 F. Supp. 480, 484–85 (W.D. Wis. 1991).

51. See Rand, *Tribal Influence*, *supra* note 16, at 983.

52. 18 U.S.C. § 1166(a) (2006).

53. *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1310 (10th Cir. 2004).

hibit certain forms of gaming, it does not have jurisdiction to regulate gaming.<sup>54</sup> Therefore, whether a state can prevent a tribe from conducting Class III gaming turns on whether the state is prohibiting or regulating the particular gaming.<sup>55</sup> Currently, federal courts dispute when a state crosses the line of prohibiting Class III gaming and begins regulating Class III gaming.<sup>56</sup>

Courts use two tests to determine whether a state permits Class III gaming as defined by IGRA.<sup>57</sup> The first test used to determine whether a state prohibits or permits a particular type of gaming is the game-specific approach.<sup>58</sup> Under this approach a state does not permit a type of gaming unless the “state allows a particular game for any purpose.”<sup>59</sup> The second test used by courts is the categorical approach.<sup>60</sup> The categorical approach holds that a state must permit all forms of Class III gaming, if any form of Class III gaming is permitted in the state.<sup>61</sup> Consequently, whether a state is considered to permit a particular type of gaming depends on the test adopted by the court of the jurisdiction.<sup>62</sup>

One way a state can avoid being forced to negotiate a compact is by arguing that the type of gaming the tribe is seeking violates the state’s public policy.<sup>63</sup> For example, in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,<sup>64</sup> an Indian tribe filed suit to force the state to negotiate a gaming compact.<sup>65</sup> At the time of suit, California did not permit “banked or percentage card games” to be conducted.<sup>66</sup> The court held that when a state does not permit the type of gaming that the tribe is requesting, the tribe does not have a right to engage in the illegal gaming.<sup>67</sup> Therefore, the court held that the state did not have to negotiate with the tribe to grant it a form of gaming

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54. See 25 U.S.C. § 2710(d)(1)(A).

55. *Id.* § 2710(d).

56. *N. Arapaho Tribe*, 389 F.3d at 1310–11.

57. *Id.*

58. *N. Arapaho Tribe*, 389 F.3d at 1311; see *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994).

59. *N. Arapaho Tribe*, 389 F.3d at 1311.

60. *Id.* (citing *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1031–32 (2d Cir. 1990) (adopting the categorical approach)).

61. *Id.*

62. See *id.*

63. Rosenberg, *supra* note 8, at 292.

64. 64 F.3d 1250 (9th Cir. 1994).

65. *Id.* at 1255.

66. *Id.* at 1256.

67. *Id.* at 1258.

that was otherwise not permitted.<sup>68</sup> However, in *LAC du Flambeau Band of Lake Superior Chippewa Indians v. State*,<sup>69</sup> an Indian tribe brought an action to force the state to negotiate a gaming compact.<sup>70</sup> The court held that because the state permits Class III gaming, it must negotiate a compact with the tribe that would grant the tribe permission to conduct Class III gaming.<sup>71</sup> The dividing line between these two cases can be drawn at each state's public policy.<sup>72</sup> In *Rumsey*, the state's public policy towards gaming was prohibitory, thus the state did not have to negotiate a compact for Class III gaming.<sup>73</sup> However, in *Lac du Flambeau Band*, the state's policy against gaming was regulatory, resulting in the state being forced to negotiate a compact.<sup>74</sup>

### III. GAMING COMPACT

If the type of gaming the tribe seeks to conduct is authorized by the tribe's governing body, and the state does not prohibit the type of gaming, next the tribe must enter a compact with the state to obtain Class III gaming.<sup>75</sup> IGRA provides that a tribe cannot operate Class III gaming unless specifically permitted by a tribal-state compact signed by the tribe and the state where the Class III gaming is being conducted.<sup>76</sup> A compact is a covenant or agreement between states or governments.<sup>77</sup> Under the United States Constitution, a state cannot enter into a compact with another state or foreign power.<sup>78</sup> IGRA, however, eliminates this restriction by setting forth the consent of Congress to all gaming compacts to be executed, contingent on federal approval making them effective.<sup>79</sup> IGRA's requirements that a tribe reaches a compact with the state before it can conduct Class III gaming has important ramifications by making "the tribes' sovereign right to conduct gaming dependent on state consent."<sup>80</sup> Therefore, the Act prevents a tribe

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68. *See id.* The state did not allow banked card games. *Rumsey Indian Rancheria of Wintun Indians*, 64 F.3d at 1256. The state did not have to give the tribe a form of gaming that others could not have. *Id.* at 1258.

69. 770 F. Supp. 480 (W.D. Wis. 1991).

70. *Id.* at 481.

71. *Id.* at 488.

72. *See id.*

73. *See Rumsey Indian Rancheria of Wintun Indians*, 64 F.3d at 1259.

74. *See LAC du Flambeau Band of Lake Superior Chippewa Indians*, 770 F. Supp. at 488.

75. *See* 25 U.S.C. § 2710(d)(1)(C) (2006).

76. *See id.*

77. BLACK'S LAW DICTIONARY 298 (8th ed. 2004).

78. U.S. CONST. art. I, § 10.

79. *See* 25 U.S.C. § 2710(d).

80. Rosenberg, *supra* note 8, at 288.

from conducting profitable Class III gaming, without first obtaining a compact signed by the state.<sup>81</sup>

#### A. *Compact Process*

The importance of the tribal-state compact to Indian gaming is clear. “The essential feature of the Act is the tribal-state compact process, the means Congress devised to balance the states’ interest in regulating high stakes gambling within their borders and the Indians’ resistance to state intrusions on their sovereignty.”<sup>82</sup> The process a tribe must follow to negotiate a compact under IGRA can be summarized as follows. First, the tribe must request that the state negotiate a compact that would permit Class III gaming.<sup>83</sup> Once a request to negotiate is made by the tribe, IGRA requires that the state “negotiate with the Indian tribe in good faith to enter into such a compact.”<sup>84</sup> If an agreement is not reached within 180 days of the tribes request to negotiate a compact, the tribe is permitted to sue the state in federal court by alleging the state did not negotiate in good faith.<sup>85</sup> If the federal court finds that the state did not act in good faith, the state will be ordered to reach a compact with the tribe within sixty days.<sup>86</sup> Upon the expiration of the sixty-day negotiation period, if a compact has not been reached, the court will appoint a mediator.<sup>87</sup> Both the tribe and the state are required to submit proposed compacts to the mediator.<sup>88</sup> Next, the mediator will select one of the proposed compacts.<sup>89</sup> Once a proposal is selected by the mediator, the proposal is presented to each party and the state must consent to the proposed compact within sixty days.<sup>90</sup> Once the compact is submitted to the Department of the Interior, the compact will be approved or disapproved within

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81. *Id.* at 288–89.

82. *LAC du Flambeau Band of Lake Superior Chippewa Indians v. State*, 770 F. Supp. 480, 481 (W.D. Wis. 1991).

83. *Laxague*, *supra* note 47, at 80. The tribal-state “process begins when the Indian tribe requests that the state enter into negotiations for creating a tribal-state compact that will govern the Class III gaming operations planned by the tribe.” *Id.*

84. 25 U.S.C. § 2710(d)(3)(A).

85. *Id.* § 2710(d)(7)(B); *Laxague*, *supra* note 47, at 80 (explaining that bad faith can be based on criminality, financial integrity, public safety, and “economic impact on existing gaming” facilities).

86. 25 U.S.C. § 2710(d)(7)(B)(iii).

87. *Id.* § 2710(d)(7)(B)(iv).

88. *Id.*

89. *Id.* When selecting one of the proposed compacts the mediator will choose “the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court.” *Id.*

90. 25 U.S.C. § 2710(d)(7)(B)(v)–(vii).

forty-five days.<sup>91</sup> The remainder of part III evaluates the most common issues which arise during the compact process.

### 1. Indian Land Requirement

Whether a tribe is able to pursue the compact process is dependent on the status of the tribe's land.<sup>92</sup> IGRA defines Indian land as land located within an Indian reservation, land that is held in trust by the United States, or held in trust by someone else who is restricted by the United States.<sup>93</sup> Furthermore, for a tribe to have the right to conduct gaming on its land, the land must have become Indian land before October 17, 1988.<sup>94</sup> Without the requisite land, a tribe cannot utilize IGRA to obtain gaming rights and would have to argue that it qualifies for an exception.<sup>95</sup> If the tribe does not qualify under an exception, the last method of obtaining the requisite land is through the federal government, "if the Secretary of the Interior determines . . . it would be in the best interest of the tribe, would not be detrimental to surrounding communities, and that state and local officials [would] agree."<sup>96</sup> With states reluctant to approve gaming being conducted off of an Indian reservation, a tribe faces a difficult task if the land was not recognized before 1988.<sup>97</sup> Additionally, "it is clear that the [s]tate does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands."<sup>98</sup> Therefore, without land satisfying the requirements of IGRA, the tribe cannot pursue the compact process to obtain gaming rights.<sup>99</sup>

Further restricting a tribe's ability to seek gaming rights is the Court's recent decision in *Carcieri v. Salazar*.<sup>100</sup> In this case, the Department of the Interior accepted land in trust to be used by an Indian tribe.<sup>101</sup> The Governor of Rhode Island brought suit to have the Department of the Interior's decision to take the land in trust reviewed.<sup>102</sup> The Court addressed 25 U.S.C. §

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91. See *id.* § 2710(d)(8)(C). If no action is taken, "the compact shall be considered to have been approved by the Secretary." *Id.*

92. Alan E. Brown, Note, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 161 (2005).

93. See 25 U.S.C. § 2719(a) (2006).

94. *Id.*

95. See *id.* § 2719(a)-(b).

96. Brown, *supra* note 92, at 168.

97. *Id.* at 166-68.

98. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler, 304 F.3d 616, 618 (6th Cir. 2002) (citing 25 U.S.C. § 2710(d)(3)(A)).

99. See *id.*

100. 129 S. Ct. 1058 (2009).

101. *Id.* at 1060.

102. *Id.*

465, which allows the Secretary of the Department of the Interior (Secretary) to accept land in “trust only for ‘the purpose of providing land for Indians.’”<sup>103</sup> The Court held “that the term ‘now under Federal jurisdiction’ in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”<sup>104</sup> Although the ramifications of the recent decision remain unclear, it appears that the decision will limit the power of the Secretary.<sup>105</sup> Further, less tribes will have the opportunity to acquire the land necessary to obtain gaming rights as the Secretary lacks “authority to acquire land for a tribe recognized and coming under federal jurisdiction after 1934.”<sup>106</sup>

## 2. Negotiation

Once a tribe shows they have land eligible to conduct Class III gaming on, the tribe must negotiate with the state to reach a compact.<sup>107</sup> Once the tribe requests that the state negotiate a compact, IGRA specifies that “the [s]tate shall negotiate with the Indian tribe in good faith to enter” such a compact.<sup>108</sup> If the tribe believes that the state did not conduct negotiations in good faith, IGRA grants the tribe the power to sue the state in federal court.<sup>109</sup> To determine whether the state negotiated in good faith, the court will evaluate “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.”<sup>110</sup> If the Court concludes that the state acted in good faith, the compact process ends.<sup>111</sup> However, if the court finds that the state “failed to negotiate in good faith,” the compact process continues.<sup>112</sup> This provision of IGRA was severely limited by the Court’s decision in *Seminole Tribe of Florida v. Florida* (*Seminole Tribe II*).<sup>113</sup> *Seminole Tribe II* held when a state asserts the Eleventh Amendment’s sovereign immunity, the state cannot be sued by the

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103. *Id.* at 1064 (quoting 25 U.S.C. § 465).

104. *Id.* at 1068.

105. G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”*: Updating the Trust Land Acquisition Process, 45 IDAHO L. REV. 575, 593–94 (2009).

106. *Id.*

107. See 25 U.S.C. § 2710(d)(3)(A) (2006).

108. *Id.*

109. *Id.* § 2710(d)(7)(A)(i).

110. *Id.* § 2710(d)(7)(B)(iii)(I).

111. See *id.* § 2710(d)(7)(B)(iii).

112. 25 U.S.C. § 2710(d)(7)(B)(iii).

113. 517 U.S. 44, 44 (1996).

tribe in federal court.<sup>114</sup> The Court's ruling limited the power a tribe has to engage in Class III gaming.<sup>115</sup> Therefore, *Seminole Tribe II* left the negotiation process procedure unclear.<sup>116</sup> "One possibility is that there is a right but no remedy: a tribe can seek a compact, but cannot sue the state if it refuses to negotiate."<sup>117</sup>

a. *Authority to Negotiate*

Although IGRA sets forth the requirements a state must follow to enter a compact with an Indian tribe, and even requires that the state negotiate in good faith, IGRA does not specify the role of state legislatures.<sup>118</sup> In the absence of guidelines, the governors of most states have exercised the authority to negotiate tribal-state compacts with Indian tribes.<sup>119</sup> Therefore, due to the lack of federal guidelines, the authority to negotiate is determined by state law.<sup>120</sup>

Some courts have held that the state's governor has the authority to negotiate a gaming compact.<sup>121</sup> *Dewberry v. Kulongoski*<sup>122</sup> is an example of a state that grants the governor authority to negotiate a compact with a tribe.<sup>123</sup> In *Dewberry*, opponents of gambling challenged the validity of a compact that was signed by the Governor.<sup>124</sup> The plaintiff claimed that the compact was invalid because "neither the Oregon Constitution nor Oregon statute delegate the authority to execute gaming compacts with Indian tribes, and thus the [g]overnor is without the power to do so without legislative approval."<sup>125</sup> The court disagreed, however, and held that the Oregon Constitution granted the Governor the authority to negotiate a gaming compact.<sup>126</sup>

114. *Id.* at 72.

115. Steven A. Light, Kathryn R.L. Rand, & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 665 (2004). "In the wake of the Court's decision in *Seminole Tribe*, a state effectively could prevent a tribe from engaging in Class III gaming simply by refusing to negotiate a tribal-state compact." *Id.*

116. *See id.*

117. ROBERT M. JARVIS ET AL., GAMING LAW CASES AND MATERIALS 493 n.3 (2003).

118. Rand, *Tribal Influence*, *supra* note 16, at 981.

119. *Id.*

120. *Id.* at 982.

121. *See Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 443-44 (Wis. 2006) (Compact entered into by the governor was valid even though it increased the amount of gambling allowed in the state.).

122. 406 F. Supp. 2d 1136 (D. Or. 2005).

123. *Id.* at 1157.

124. *Id.* at 1138.

125. *Id.* at 1154.

126. *Id.*



In contrast, the majority of state courts have held that, although the governor has the authority to negotiate a compact, the governor lacks the authority to bind the state to the compact without legislative approval.<sup>127</sup> While the holdings are not identical, challenges to the governor's authority have a common theme—questions regarding the state's constitution.<sup>128</sup> In line with these state court decisions, federal courts have also held that the governor lacks the power to bind the state to a gaming compact.<sup>129</sup> For example, in *Pueblo of Santa Ana v. Kelly*,<sup>130</sup> the court held that the governor entering into a compact solely by himself was not enough to make the compact valid.<sup>131</sup> Further, because "the [g]overnor lacked the authority to bind the state . . . [t]he compact[] [provisions] were therefore never validly 'entered into' by the state and, as a result, do not comply with IGRA."<sup>132</sup> While all of these cases do not have the same outcome, they share in common the procedure of turning to the state's constitution to determine if the governor's action were valid.<sup>133</sup>

It should also be noted that if a member of a tribe had an issue with a compact that was entered into between the state and their tribe, he or she would likely have no recourse.<sup>134</sup> In *Langley v. Edwards*,<sup>135</sup> the court held that a tribe member could not challenge the validity of a compact entered into by a tribe and state.<sup>136</sup> The court explained that the tribe members' "dissatisfaction is with the Tribe's decision to permit gaming on tribal lands and should be properly resolved within the tribal governmental and court structure."<sup>137</sup> Similarly, in *Willis v. Fordice*,<sup>138</sup> an Indian tribe member brought an action to have a tribal-state compact declared void.<sup>139</sup> The court ruled that

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127. See Fla. House of Representatives v. Crist, 999 So. 2d 601, 609 (Fla. 2008) (discussing states that have followed the majority rule that a governor lacks the "authority to bind a state to an IGRA compact . . .").

128. See Rand, *Tribal Influence*, *supra* note 16, at 982–83.

129. See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1559 (10th Cir. 1997).

130. *Id.* at 1546.

131. *Id.* at 1559.

132. *Id.*

133. See Rand, *Tribal Influence*, *supra* note 16, at 982–83.

134. See *Langley v. Edwards*, 872 F. Supp. 1531, 1536 (W.D. La. 1995).

135. *Id.* at 1531.

136. *Id.* at 1536.

137. *Id.*

138. 850 F. Supp. 523 (S.D. Miss. 1994).

139. *Id.* at 524–25.

the tribe member did not have standing to bring the action and held that the compact was valid under both state and federal law.<sup>140</sup>

### 3. Approval by the Department of the Interior

If the state and the Indian tribe enter into a compact, it then must be approved by the Secretary of the Department of the Interior.<sup>141</sup> Therefore, even if the state and the tribe negotiate a compact, it will not take effect until approved by the Secretary who “is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State government gaming on Indian lands of such Indian tribe.”<sup>142</sup> When reviewing the compact, the Secretary can disapprove it if the compact violates “the trust obligations of the United States to Indians.”<sup>143</sup> This authority to disapprove the compact has been used to place restrictions on the compact that the Secretary is willing to approve.<sup>144</sup>

#### a. *Exclusivity Requirement*

The Department of the Interior has used its statutory authority to require that a gaming compact grant the tribe exclusive gaming rights.<sup>145</sup> Citing the federal governments trust responsibility, the Department stresses it will only approve “compacts that provide substantial exclusivity for Indian gaming in the state.”<sup>146</sup> Because of this substantial exclusivity requirement, a compact is much more likely to be approved if the tribe is permitted to conduct gaming that is prohibited everywhere else in the state.<sup>147</sup> Therefore, the exclusivity requirement can be summarized as:

[T]he Tribes enjoy the exclusive “right to operate” so long as the Tribes are the only persons or entities who have and can exercise the “right to operate” electronic games of chance in the State or, in

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140. *Id.* at 528–29, 534 (The compact was valid because Mississippi allowed legalized gambling as a matter of public policy, the governor held the power to negotiate with the tribe, and the compact was approved by the Secretary.).

141. *See* 25 U.S.C. § 2710(d)(3)(B)(2006).

142. *Id.* § 2710 (d)(8)(A); *see also id.* §2710 (d)(3)(B).

143. *Id.* § 2710 (d)(8)(B)(iii).

144. *See* Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 469 (2003).

145. *Id.*

146. *Id.*

147. Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 328 (2005).

other words, as long as all others are prohibited or shut out from the “right to operate” such games.<sup>148</sup>

An example of the exclusivity requirement is present in *Artichoke Joe’s California Grand Casino v. Norton*,<sup>149</sup> where a card club brought an action on equal protection grounds challenging the validity of tribal-state compacts, which were approved by IGRA.<sup>150</sup> The plaintiffs were prohibited from engaging in casino-style gaming, but the compacts provided the Indian tribes with the exclusive right to engage in Class III gaming.<sup>151</sup> Despite the Indians being granted the exclusive right to conduct Class III gaming in the state, the court rejected the plaintiff’s argument that the compact constituted a monopoly.<sup>152</sup> Therefore, the court held that the tribal-state compact was valid under IGRA, and the compact did not violate the Plaintiff’s right of equal protection.<sup>153</sup>

#### b. *Power to Unilaterally Grant Gaming*

In response to *Seminole Tribe II*, the Secretary proposed and had approved rules that would permit the creation of Class III gaming without the state entering a compact with the tribe.<sup>154</sup> As a result of the rules, a tribe can now obtain gaming rights in a state that does not approve of a compact.<sup>155</sup> “In sum, these regulations allow the Secretary to approve a gaming compact after a suit is brought under IGRA and the state has asserted its Eleventh Amendment right against suit in federal court.”<sup>156</sup> Although the Secretary has been granted such power, it remains unclear whether or not granting this power is valid.<sup>157</sup>

There have only been a few judicial opinions which address the issue of whether the Secretary of the Interior has the authority to grant the tribe Class

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148. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d 850, 852 (W.D. Mich. 2000) (citation omitted).

149. 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004).

150. *Id.* at 714. The plaintiff’s challenged the compact which was entered into “[p]ursuant to an amendment to the California Constitution that permits casino-style gaming only on Indian lands.” *Id.*

151. *See id.*

152. *Id.* at 739 (“[W]e are unpersuaded by Plaintiffs’ argument that allowing California to grant to tribes a monopoly on [C]lass III gaming operations, restricted to Indian lands, necessarily will lead to Indian monopolies on other forms of economic activity.”).

153. *Artichoke Joe’s Cal. Grand Casino*, 353 F.3d at 742.

154. *See* 25 U.S.C. §§ 2703–10 (2006).

155. Lindner-Cornelius, *supra* note 18, at 693.

156. *Id.*

157. *See id.* at 686.

III gaming without a tribal-state compact.<sup>158</sup> Possible support of the Secretary's power can be found in *Seminole Tribe of Florida v. Florida (Seminole I)*,<sup>159</sup> where the Eleventh Circuit stated the Secretary, after the state asserts Eleventh Amendment immunity, the case is dismissed, and the Secretary is notified of the failed negotiation, "then may prescribe regulations governing [C]lass III gaming on the tribe's lands."<sup>160</sup>

In *Spokane Tribe of Indians v. Washington*,<sup>161</sup> the Secretary's power was explicitly rejected when the court stated, "[t]he Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation."<sup>162</sup> The court supported its statement by arguing that under IGRA, the Secretary of the Interior should only be consulted after a mediator is appointed by the court to direct negotiations between the state and the tribe.<sup>163</sup> Even after the negotiations occur, the Ninth Circuit explained, "the Secretary of the Interior under the statute is to act only as a matter of last resort."<sup>164</sup> Similarly, in *Texas v. United States*,<sup>165</sup> the court held that the Secretary did not have the authority to proscribe Class III gaming when the state does not consent to being sued.<sup>166</sup> Although it remains unclear whether the Secretary's power to grant gaming rights to the tribe without the state's consent is valid, the severity of the threat itself is enough for it to be taken seriously by a state.<sup>167</sup>

#### IV. FLORIDA GAMING HISTORY

Originally the State of Florida was exceedingly opposed to any form of gambling.<sup>168</sup> However, over time this immense opposition was gradually

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158. Laxague, *supra* note 47, at 83.

159. 11 F.3d 1016 (11th Cir. 1994), *aff'd on other grounds*, 517 U.S. 44 (1996).

160. *Seminole Tribe I*, 11 F.3d at 1029 (dictum). See *Seminole Tribe II*, 517 U.S. 44, 76 n.18 (1996) (The court did not address the issue of whether the Secretary had the power to proscribe Class III gaming without a compact.).

161. 28 F.3d 991 (9th Cir. 1994).

162. *Id.* at 997.

163. *Id.*

164. *Id.*

165. 497 F.3d 491 (5th Cir. 2007).

166. *Id.* at 512.

167. See Neil Scott Cohen, Note, *In What Often Appears to Be a Crapshoot Legislative Process, Congress Throws Snake Eyes When It Enacts the Indian Gaming Regulatory Act*, 29 HOFSTRA L. REV. 277, 301 (2001).

168. See FLA. CONST. art. X, § 7. "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." *Id.*

reduced as more forms of gaming became permitted in the state.<sup>169</sup> In the 1930s Florida permitted legal betting which included betting on jai alai, horse races, and dog races.<sup>170</sup> “Beginning in 1978, Florida voters thrice rejected constitutional amendments that would have forced the state to allow casino gambling. But Florida’s political leaders have allowed legal gambling to gradually increase throughout the state anyway.”<sup>171</sup> The first cruise ship offering day cruises for gamblers set sail in the early 1980s, and in 1986 Florida voters approved the creation of a state-run lottery.<sup>172</sup> In addition, in 2004, a voter’s petition amended the Florida Constitution to allow Class III slots in both Broward and Miami-Dade Counties.<sup>173</sup>

#### A. *Seminole Gaming*

The first controversy surrounding Seminole gaming in Florida began in 1979 when the Tribe opened a bingo hall facility on the Seminole Reservation in Broward County.<sup>174</sup> In *Seminole Tribe of Florida v. Butterworth*,<sup>175</sup> the Seminole Tribe requested that the court “enjoin permanently the Sheriff of Broward County from enforcing Florida’s bingo statute on Indian land.”<sup>176</sup> The court ruled in favor of the Tribe, holding that because of the Tribe’s sovereignty, its bingo hall could not be regulated by the state.<sup>177</sup> Shortly after the Seminole Tribe’s favorable ruling in *Butterworth*, Congress enacted IGRA, which afforded tribes the right to negotiate a compact with the state.<sup>178</sup> Despite the adoption of the IGRA, the Seminole Tribe has not been successful in negotiating a compact with the State of Florida.<sup>179</sup>

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169. See Charlie Patton, *State Eyes Gambling on Casinos the House and Senate Are Trying to Bulk up State Coffers with Indian Revenue*, FLA. TIMES UNION, Apr. 28, 2008, at A1.

170. *Id.*

171. *Id.*

172. *Id.*

173. FLA. CONST. art. X, § 23.

174. See Rosenberg, *supra* note 8, at 287. “In 1979, the Seminole Tribe of Florida opened the first reservation-based bingo parlor.” *Id.*

175. 491 F. Supp. 1015 (S.D. Fla. 1980), *aff’d*, 658 F.2d 310 (5th Cir. 1981).

176. *Id.* at 1016. The statute provided that bingo could not be conducted more than twice a week and limited the amount of money that could be won. *Id.* at 1016 n.1.

177. *Id.* at 1020.

178. 25 U.S.C. §§ 2701–21 (2006).

179. See Fla. House of Representatives v. Crist, 999 So. 2d 601, 616 (Fla. 2008).

## 1. First Compact

The negotiation of a gaming compact often becomes a political affair, and the State of Florida is no exception to this trend.<sup>180</sup> After the Seminole Tribe's unsuccessful attempt to compel the State of Florida to negotiate a compact, the Tribe continued to petition the Department of the Interior (Department).<sup>181</sup> After several failed attempts, the Tribe convinced the Department to take affirmative action in 2006, when the Department proclaimed that if the State of Florida did not sign a compact with the Seminole Tribe within sixty days, the Department would grant the Seminole Tribe Class III gaming.<sup>182</sup> However, the Seminole Tribe sued the Department after sixty days had passed, because a compact was not reached and the Department failed to initiate procedures allowing the Seminole Tribe to conduct Class III gaming.<sup>183</sup> This suit prompted the Department to once again send a demand to the State of Florida, and Governor Crist was advised to enter a compact.<sup>184</sup> November 15, 2007, was set as a deadline for the compact to be entered into with the threat that if a compact was not reached, Class III gaming would be granted to the Seminole Tribe unilaterally, and the state would miss its opportunity to share in the profits.<sup>185</sup>

Seemingly compelled by the Department's threat, Governor Crist entered into a compact with the Tribe.<sup>186</sup> To support his decision, "Crist argued the deal was needed to ensure that Florida got a share of Indian gambling revenues."<sup>187</sup> However, five days after Governor Crist signed the compact, the Florida House of Representatives filed a petition that challenged the validity of the compact.<sup>188</sup> The petition challenged the "Governor's authority to bind the [s]tate to the [C]ompact without legislative authorization or ratification."<sup>189</sup> Despite the immediate challenge to the compact, it went into effect on January 7, 2008, after it was approved by the Secretary.<sup>190</sup>

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180. See Rand, *Pequots*, *supra* note 23, at 52.

181. *Crist*, 999 So. 2d at 605.

182. *Id.*

183. *Id.*

184. *Id.*

185. See Dara Kam, *Fight Brewing over Feds' Vow to Expand Seminole Gambling*, PALM BEACH POST, Nov. 9, 2007, at A5. "Interior Department Assistant Secretary Carl Artman has warned Crist that federal officials will establish Class 3 procedures for the Seminoles if a compact is not signed by Nov. 15." *Id.*

186. See *Crist*, 999 So. 2d at 605–06.

187. Patton, *supra* note 169.

188. *Crist*, 999 So. 2d at 606.

189. *Id.*

190. *Id.*

The compact allowed Class III gaming to be conducted at seven casinos in the State of Florida within the following counties: Okeechobee, Coconut Creek, Clewiston, Immokalee, Tampa, and two in Hollywood.<sup>191</sup> The Class III gaming that the Tribe was authorized to offer included: slot machines, banked card games, high-stake poker games, and any other gaming authorized in the State of Florida.<sup>192</sup> Because the compact allowed the Seminole Tribe to conduct some Class III gaming, such as banked card games which are prohibited under state law, the Tribe was given an exclusive gaming right.<sup>193</sup> The Seminole Tribe was not the only party that benefited from the compact though; the State of Florida was set to receive fifty million dollars once the compact became effective.<sup>194</sup> In addition to that sum, during the first twenty-four months of the compact's operation, the State of Florida would receive an additional \$175 million, \$150 million for the third twelve months of operation, and \$100 million for each additional twelve-month cycle.<sup>195</sup>

## 2. Failure of First Compact

The Florida House of Representatives challenged the validity of the compact by arguing that the Governor acted outside the scope of his authority.<sup>196</sup> The House argued that the Legislature was granted all law-making power under the Florida Constitution.<sup>197</sup> Like cases in other jurisdictions, which addressed a claim that the governor did not have authority to negotiate a compact, the Court looked to the constitution.<sup>198</sup> While turning to the Florida Constitution, the court evaluated whether the Governor's actions violated the separation of powers doctrine.<sup>199</sup> Article II, section 3 of the Florida Constitution provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."<sup>200</sup> In Florida, the separation of powers doctrine has been

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191. *Id.*

192. *Id.*

193. *Crist*, 999 So. 2d at 606.

194. *Id.*

195. *Id.*

196. *Id.* at 613.

197. See Steve Huettel, *Gambling Interests: Where to Draw the Line on Gaming, Money*, ST. PETERSBURG TIMES, Feb. 24, 2008, at P1. Rubio sued Crist "charging the governor overstepped his authority signing the Seminole compact without legislative approval." *Id.*

198. *Crist*, 999 So. 2d at 610.

199. *Id.* at 610-11.

200. FLA. CONST. art. II, § 3.

strictly construed, thereby favoring a finding of one branch of government usurping another branch's powers.<sup>201</sup>

The House argued that the power to enter into a compact belongs to the legislative branch because of residual power.<sup>202</sup> The basis for the House's argument is represented by a Supreme Court of Florida decision where the Court held, "[t]he legislative branch looks to the [c]onstitution not for sources of power but for limitations upon power."<sup>203</sup> Consequently, its argument was that the legislature should receive a power when it is unclear which branch of government it belongs to.<sup>204</sup> By contrast, the Governor's argument was based on article IV, section 1 of the Florida Constitution.<sup>205</sup> Article IV, section 1 of the Florida Constitution grants the Governor the power to "transact all necessary business with the officers of government."<sup>206</sup> Using this language, the Governor argued that he held the power to enter negotiations with the Indian Tribe, and thereby enter into a compact.<sup>207</sup>

After reviewing both the House's and the Governor's arguments, the Supreme Court of Florida determined that the Governor's actions violated the separation of powers doctrine.<sup>208</sup> The Court found that the Governor exceeded his power by permitting Class III gaming, an act that was illegal in the state.<sup>209</sup> "The Governor does not have authority to agree to legalize in some parts of the state, or for some persons, conduct that is otherwise illegal throughout the state."<sup>210</sup> The House relied on IGRA's requirement that for a tribe to enter into a compact, the gaming must be "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."<sup>211</sup> The Court cited cases which followed the categorical approach, and determined that allowing some forms of Class III gaming does not mean that all forms are permitted.<sup>212</sup> The Court stated that both the Secretary's and federal courts' interpretations support the House's argument, which followed the categorical approach to determine whether a particular

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201. See *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

202. See Michael C. Bender, *Rubio Seeks Halt to Crist-Seminole Deal*, PALM BEACH POST, Nov. 20, 2007, at A4.

203. See *State ex rel. Green v. Pearson*, 14 So. 2d 565, 567 (Fla. 1943).

204. See *id.*

205. *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 612 (Fla. 2008).

206. FLA. CONST. art. IV, § 1.

207. *Crist*, 999 So. 2d at 612.

208. *Id.* at 613.

209. *Id.*

210. *Id.*

211. 25 U.S.C. § 2701(5) (2006); see *Crist*, 999 So. 2d at 614–15.

212. *Crist*, 999 So. 2d at 615.



form of gaming is prohibited by law.<sup>213</sup> Therefore, because the compact authorized a prohibited form of gaming, the Court held that the compact was a violation of Florida law.<sup>214</sup>

The Supreme Court of Florida's decision represents the complex history of Seminole gaming in Florida, as the negotiations that have been taking place in some form or another since 1991 were again put to a halt.<sup>215</sup> However, despite the Supreme Court of Florida's holding, not much has changed for the Seminole Tribe as it continues to conduct business as though the compact is valid.<sup>216</sup>

#### B. *Senate Bill 788*

The Supreme Court of Florida ruled the first compact entered into between Governor Crist and the Seminole Tribe invalid on July 3, 2008.<sup>217</sup> By the next legislative session, in 2009, the framework for a new compact was drafted by both the Florida House of Representatives and the Florida Senate.<sup>218</sup> The House bill was drafted to make minor changes, and would require the Seminoles to stop offering games such as blackjack, but allow them to continue to offer Las Vegas-style slot machines.<sup>219</sup> Contrary to the House bill, the Senate bill significantly increases the amount of gaming, by granting the Seminole Tribe extensive Class III gaming including roulette, craps, slot machines, blackjack, and other banked card games, in return for at least four hundred million dollars annually through extensive revenue-sharing provisions.<sup>220</sup> In an effort likely to increase support from both parties, as well as

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213. *Id.*

214. *Id.*

215. See Linda Kleindienst, *State High Court Asked to Decide on Compact Legislators Challenge Crist's Agreement with Seminoles*, SUN-SENTINEL, Jan. 31, 2008, at B3.

216. See Fla. H.R. Comm. on Seminole Indian Compact Review, HB 7129 (2009) Staff Analysis 6 (Apr. 10, 2009) (on file with comm.), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=pcb01.SICR.doc&DocumentType=Analysis&CommitteeId=2527&Session=2009> [hereinafter HB 7129 Staff Analysis].

The Seminole Tribe was able to begin offering Class III slots and banked card games at several of its locations in Florida . . . . The Tribe has been making revenue sharing payments to the state consistent with their position the now-voided Compact is still valid. To date, the Tribe has paid \$100 million to the State. The Legislature has not appropriated those funds.

*Id.* at 5–6.

217. *Id.* at 1.

218. See *id.*; Fla. S. Comm. on Regulated Indus., SB 788 (2009) Staff Analysis 1 (Apr. 9, 2009) (on file with comm.), available at <http://www.flsenate.gov/data/session/2009/Senate/bills/analysis/pdf/2009s0788.wpsc.pdf> [hereinafter SB 788 Staff Analysis].

219. See HB 7129 Staff Analysis, *supra* note 216, at 1.

220. SB 788 Staff Analysis, *supra* note 218, at 1–2.

the public at large, the bill mandates that all revenue payments given to the state must be deposited in the Educational Enhancement Trust Fund.<sup>221</sup>

Florida's gradual approval of gambling came full circle when law makers approved Senate Bill 788 on May 8, 2009.<sup>222</sup> One fan of the bill was Governor Crist, who "thanked lawmakers for their vigilance in finding common ground."<sup>223</sup> Another initial fan was the Seminole Tribe who stated, the Florida Legislature took a crucial step towards ending the nineteen years of waiting for Las Vegas-style gambling.<sup>224</sup> In line with the history of the relationship between the Seminole Tribe of Florida and lawmakers, the initial positive outlook for Senate Bill 788 quickly turned to similar talks of litigation that existed during the previous compact attempt.<sup>225</sup> Faced with a deadline of August 31, 2009 to sign the compact with the Seminoles, the question remains whether Senate Bill 788 should satisfy the procedures set forth by the compact process.<sup>226</sup>

### 1. Applying the Compact Requirements to Senate Bill 788

Unlike the federal government, "Florida has no statutory framework for establishing gaming compacts with Indian tribes."<sup>227</sup> Therefore, determining whether Senate Bill 788 should satisfy the compact process requires applying IGRA and the relevant case law discussed thus far. Furthermore, by comparing the failed compact of 2008 with Senate Bill 788, the chance of success for the new bill can be forecasted.

#### a. *Indian Land Requirement*

Before a tribe can benefit from the rights set forth in IGRA, and ultimately engage in compact negotiations with the state, the tribe must have the requisite land.<sup>228</sup> Generally, the tribe must have acquired the land before 1988, the year IGRA was enacted, to become eligible to begin the Class III gaming negotiation process.<sup>229</sup> However, a recent United States Supreme Court decision appears to have changed this, increasing the difficulty in sa-

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221. *See id.* at 2.

222. Klas, *supra* note 1. "The Senate voted, 31-9, for the bill (SB 788). In the more anti-gambling House, the vote was 82-35." *Id.*

223. *Id.*

224. *See id.*

225. *See* Kam, *Gaming Deal*, *supra* note 4.

226. *See id.*

227. HB 7129 Staff Analysis, *supra* note 216, at 1.

228. *See* Brown, *supra* note 92, at 161.

229. *See* 25 U.S.C. § 2719(a) (2006).

tisfying the land requirement, by holding that a tribe must have had the land in its possession in 1934 in order to be eligible to conduct Class III gaming.<sup>230</sup> Fortunately, the Seminole Tribe “is a federally recognized Indian tribe whose reservations and trust lands are located in the State” of Florida.<sup>231</sup> Therefore, the Seminole Tribe appears to be unaffected by *Carcieri*, and will likely be able to continue the negotiation process with the State of Florida to acquire Class III gaming rights.<sup>232</sup>

#### b. *Negotiation Process*

IGRA does not specify who may represent the state when negotiating a compact with a tribe.<sup>233</sup> Therefore, “[w]ithout prescribed authority in IGRA, the state legislature’s role in the compacting process is left to state law, which may require legislative approval before a tribal-state compact takes effect, or may relegate the legislature to political criticism or support of the governor’s compact negotiations.”<sup>234</sup> The Supreme Court of Florida made it clear that the Governor does not have the authority to execute a compact that authorizes gambling that is illegal.<sup>235</sup>

Senate Bill 788 allows the Seminole Tribe to conduct types of Class III gaming, which is otherwise illegal in the state.<sup>236</sup> Furthermore, Florida follows the game-specific approach, which “requires courts to review whether state law permits the specific game at issue.”<sup>237</sup> Under the game-specific approach, the fact that certain types of Class III games are permitted in the state, such as in Miami-Dade and Broward Counties, is not determinative.<sup>238</sup> Further, this approach holds that because the compact grants some form of Class III gaming that is illegal in the state, the bill authorizes illegal Class III gaming.<sup>239</sup> This means that under the holding of *Crist*, the Governor cannot execute Senate Bill 788 without “the Legislature’s prior authorization or, at least, its subsequent ratification.”<sup>240</sup>

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230. See Rice, *supra* note 105, at 593–94; *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009).

231. Fla. House of Representatives v. Crist, 999 So. 2d 601, 605 (Fla. 2008).

232. See *id.*

233. See Rand, *Tribal Influence*, *supra* note 16, at 981.

234. *Id.* at 982.

235. Fla. House of Representatives v. Crist, 999 So. 2d 601, 616 (Fla. 2008).

236. SB 788 Staff Analysis, *supra* note 217, at 1.

237. *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004) (citing *Coeur d’Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1278 (D. Idaho 1994)).

238. See *id.*

239. See *id.*

240. *Crist*, 999 So. 2d at 616.

Fortunately for the success of Senate Bill 788, it implements the holding in *Crist*.<sup>241</sup> Anticipating the same problem faced by the previous compact the Legislature drafted a bill which:

authorizes the [g]overnor to execute an agreement on behalf of the state with the Indian tribes for the purpose of negotiating agreements to develop and implement a fair and workable arrangement regarding the application of state taxes on persons and transactions on Indian Lands. It requires that such an agreement must be approved or ratified by the Legislature.<sup>242</sup>

If followed, this provision of Senate Bill 788 will avoid the issues that were fatal to the previous compact.<sup>243</sup> This is because requiring Governor Crist to have the bill ratified, if any changes are made, avoids violating the separation of powers.<sup>244</sup> Although Senate Bill 788 was drafted to avoid the compact from being held invalid due to lack of authority, the authority of Governor Crist to negotiate “expires at the end of the day on August 31, 2009.”<sup>245</sup> Therefore, if one issue arises in the compact process, it could be detrimental to Senate Bill 788.<sup>246</sup>

### c. *Approval by the Department of the Interior*

Before a tribal-state compact granting Class III rights becomes effective, it must be approved by the Department of the Interior.<sup>247</sup> The Department of the Interior has made clear its decision to only approve of compacts that grant the Indian tribes substantially exclusive gaming rights.<sup>248</sup> Rights are deemed substantially exclusive when the tribe receives “the exclusive authorization to operate Class III gaming within the state’s territory.”<sup>249</sup> Therefore, before Senate Bill 788 can become effective, the Department of the Interior must approve the compact.<sup>250</sup> Additionally, the bill will not be

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241. See SB 788 Staff Analysis, *supra* note 217, at 2.

242. *Id.*

243. See *Crist*, 999 So. 2d at 616.

244. See FLA. CONST. art. II, § 3. “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” *Id.*

245. SB 788 Staff Analysis, *supra* note 218, at 11.

246. See *id.*

247. See 25 U.S.C. § 2710(d)(3)(B) (2006).

248. See *Lent*, *supra* note 144, at 469.

249. *Eidson*, *supra* note 147, at 328.

250. See 25 U.S.C. § 2710(d)(3)(B).

approved unless the Seminole Tribe is given substantially exclusive gaming rights in the State of Florida.<sup>251</sup>

Senate Bill 788 “provides the Tribe with partial but substantial exclusivity consistent with the goals of IGRA. Payments to the state will cease if any Class III gaming is authorized in any area of the state, except Miami-Dade and Broward Counties, that is not presently authorized.”<sup>252</sup> This language makes it apparent that the Florida Legislature contemplated the substantial exclusivity requirement of IGRA.<sup>253</sup> However, when the standard is applied to the gaming granted to the Seminole Tribe, it seems likely that the Department of the Interior will not consider the requirement to be satisfied.

Under the substantial exclusivity requirement, the State of Florida must grant the Seminole Tribe the exclusive right to conduct a type of Class III gaming.<sup>254</sup> However, Senate Bill 788 authorizes the tribe to conduct Class III gaming, which is currently permitted in Miami-Dade and Broward Counties.<sup>255</sup> Since the Seminole Tribe has a valid argument that it is not given exclusive gaming rights, this step in the compact process is likely to lead to difficulties in the negotiation. In fact, the lack of exclusivity in Senate Bill 788 has already been an issue in the negotiation process.<sup>256</sup> Barry Richard, the Seminole Tribe’s attorney said, “[t]he legislature’s proposal ‘significantly impairs the guarantee of exclusivity’ and thus the profits that the tribe could earn.”<sup>257</sup> Because of the issue with Senate Bill 788 not satisfying the substantial exclusivity requirement, as required by the federal government, there could be more delay in the negotiation process, which ultimately could result in a deal not being reached by the August 31, 2009 deadline.<sup>258</sup>

Whether the Department of Interior can unilaterally grant gaming rights to a tribe without the state’s consent is an issue which has not been resolved in Florida.<sup>259</sup> Despite the Department of the Interior successfully having procedures passed that allow the unilateral granting of gaming rights to a tribe, the validity of this power remains unclear.<sup>260</sup> However, because of the great loss a state could suffer, threats from the Department of the Interior should be taken seriously.<sup>261</sup> Similar to the previous compact, threats have

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251. See Eidson, *supra* note 147, at 328; Lent, *supra* note 144, at 469.

252. SB 788 Staff Analysis, *supra* note 218, at 5.

253. See *id.*

254. See Eidson, *supra* note 147, at 328.

255. See SB 788 Staff Analysis, *supra* note 218, at 5.

256. Kam, *Gaming Deal*, *supra* note 4.

257. *Id.*

258. See *id.*

259. See SB 788 Staff Analysis, *supra* note 217, at 8–9.

260. See generally *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

261. See Cohen, *supra* note 167, at 301.

been made regarding the completion of Senate Bill 788.<sup>262</sup> Once again, while trying to negotiate the compact, Governor Crist is simultaneously being told by the Department of the Interior that the state's failure to act would result in the federal government granting the Seminole Tribe gaming rights.<sup>263</sup> Reminiscent of the prior compact, it appears Governor Crist will be forced to make "a 'battlefield decision' by negotiating the compact, knowing that if he" does not act, the United States Department of Interior may allow Class III gaming "at the tribal casinos anyway and Florida [will not get] a dime from the deal."<sup>264</sup>

## V. CONCLUSION

When Senate Bill 788 was first signed in May 8, 2009, it appeared as though the Seminole Tribe's seventeen years of negotiation attempts would finally be successful. However, with less than a month before the August 31, 2009 deadline, it seems the State of Florida and the Seminole Tribe will be unable to satisfy the complex compact process. The Florida Legislature clearly drafted Senate Bill 788 to account for the failures of the previous compact as addressed by the Supreme Court of Florida.<sup>265</sup> However, the Florida Legislature overlooked the significance of the substantial exclusivity requirement imposed by the Department of the Interior. Considering the potential for a loss of billions of dollars that could benefit the Educational Enhancement Trust Fund of Florida, both Governor Crist and the Florida Legislature should plan accordingly. Although this may require offering more gaming rights to the Seminole Tribe, giving the Department of the Interior the chance to unilaterally issue procedures may be too much of a gamble.

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262. Kam, *Gaming Deal*, *supra* note 4.

263. *See id.*

264. Kleindienst, *supra* note 215.

265. *See Fla. House of Representatives v. Crist*, 999 So. 2d 601, 616 (Fla. 2008).

## CHANGING FLORIDA'S "DAZED AND CONFUSED" PAST: HOW RECENT LEGISLATION PROVIDES MORE OPTIONS FOR SENTENCING DRUG ADDICTED OFFENDERS

LINDSAY TIMARI\*

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## I. INTRODUCTION

It is widely accepted that drugs lead to crime. Many crimes are drug-motivated, even when the crime itself has nothing to do with drugs, because the defendant either needs money for drugs or is in an altered state due to his or her drug use or addiction.<sup>1</sup> Furthermore, an increasing amount of crimes occur because of the drug addict's continuous need for drug money that is required to keep his or her body functioning.<sup>2</sup> In Florida, drug offenders account for more than twenty-nine percent of the total prison population<sup>3</sup> and cost Florida's taxpayers \$20,108 a year per offender in order to provide health treatment, educational services, and supervision while in prison.<sup>4</sup> In a struggling economy, prison alternatives, such as drug court and drug offender probation, look more and more pleasing to the eye of legislators, especially in Florida where drug courts thrive.<sup>5</sup> Such prison alternatives save money in two ways: First, the state avoids sending another person to prison; second, the low rate of recidivism indicates that successful completion of these programs prevents future crime and incarceration.<sup>6</sup>

Florida continued its efforts to rehabilitate rather than incarcerate drug offenders when, on May 27, 2009, Governor Charlie Crist signed Senate Bill 1726 into law.<sup>7</sup> The act amends various statutes, including section 921.0026(3) of *Florida Statutes*, which formerly read that a defendant's drug addiction or dependency could not, under any circumstances, be a valid rea-

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1. See OFFICE OF DRUG CONTROL, EXECUTIVE OFFICE OF THE GOVERNOR, FLORIDA'S DRUG CONTROL STRATEGY 39 (2009), available at <http://www.flgov.com/drugcontrol/pdfs/DRUGCONTROLSTRATEGY.pdf> [hereinafter FLORIDA'S DRUG CONTROL STRATEGY]. The report further states that over "the past decade, the single largest category of prison admissions has been drug offenders." *Id.* at 41.

2. See JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 29 (2001).

3. See 2007–2008 FLA. DEP'T OF CORR. ANN. REP. 33, available at [http://www.dc.state.fl.us/pub/annual/0708/pdfs/Annual\\_Report\\_0708.pdf](http://www.dc.state.fl.us/pub/annual/0708/pdfs/Annual_Report_0708.pdf).

4. *Id.* at 16.

5. See FLORIDA SUPREME COURT TASK FORCE ON TREATMENT-BASED DRUG COURTS, REPORT ON FLORIDA'S DRUG COURTS 5 (2004), available at [http://www.flcourts.org/gen\\_public/family/drug\\_court/bin/taskforcereport.pdf](http://www.flcourts.org/gen_public/family/drug_court/bin/taskforcereport.pdf) [hereinafter REPORT ON FLORIDA'S DRUG COURTS].

6. *Id.* at 11.

7. Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 585 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 985.345). While this bill is now currently Florida law, this article will refer to the law as "Senate Bill 1726" for identification purposes.



son for a downward departure from the sentencing guidelines.<sup>8</sup> Therefore, if an offender scored mandatory prison time, a judge was not permitted to consider drug abuse or addiction and send the offender to drug court or drug offender probation instead, even if the judge believed prison was not the best answer for the offender.<sup>9</sup> However, chapter 2009-64, Florida Laws, states that a judge may now consider the defendant's substance abuse as a mitigating factor and depart from the minimum sentence accordingly, giving judges more discretion in allowing those who require rehabilitation, rather than imprisonment, get the personalized attention they need.<sup>10</sup> The new law also made changes to the qualifications of drug offender probation and postadjudicatory treatment-based drug court programs by adding that an offender need not have been charged with possession or purchase of a controlled substance alone in order to qualify for drug offender probation or drug court.<sup>11</sup> While the act clearly made strides in expanding judicial discretion over sentencing, there are still certain parts of the amended laws which continue to place undeserving addicts in jail rather than treatment centers.<sup>12</sup>

This article will discuss Florida's previous limitations on the court's ability to sentence drug addicts to probation or treatment programs and how Senate Bill 1726's amendments expanded judicial discretion in this area. Part II provides background history on the drug war and the effects Nixon's statement had on the courts' and lawmakers' approach to drug offenders and addicts. Part II also discusses the two main problems with sentencing guidelines: mandatory minimums and downward departures. Part III's case analysis sheds light on the problems with the statutes prior to the amendments. It explains how Florida courts interpreted the statutes and how the statutes treated defendants who were chronic drug abusers or had a history of drug problems. The purpose of this section is to highlight the importance of the new amendments. Part IV begins with an in-depth look at the effects that the new law has on the statutes in place. Furthermore, Part IV explains the purpose and requirements of drug courts, downward departures, and drug offender probation. Part IV ends with a cultural and social look on the need for a change and how society's view of drug addicts influences the legislature.

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8. FLA. STAT. § 921.0026(3) (2008).

9. *Id.*; see Aaron M. Clemens & Hale R. Stancil, *Unhandcuffing Justice: Proposals to Return Rationality to Criminal Sentencing*, 83 FLA. B.J. 54, 56 (Feb. 2009).

10. Ch. 2009-64, 2009 Fla. Laws at 580 (reading that a departure based on a defendant's substance abuse or addiction is permitted when the "defendant's offense is a nonviolent felony . . . and the court determines that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program").

11. *See id.* at 583.

12. *Id.* at 580-81, 583 (stating that in order to qualify for drug offender probation, the defendant must not score over fifty-two points on the state scoresheet).

Part V applies the new amendments to the cases discussed in Part III in order to show how the changes will affect future defendants. Part VI asks if the amendments are good enough to solve the problem of sending drug addicts to jail rather than treatment centers. Finally, Part VII concludes this article.

## II. THE COURT AND THE DRUG WAR

### A. *The “War on Drugs” and Mandatory Minimums*

In 1971, President Nixon declared war on drugs and named drug abuse “public enemy number one in the United States.”<sup>13</sup> Eleven years later, citizens in Miami lobbied the White House for help with the city’s escalating drug crisis.<sup>14</sup> President Reagan responded by creating the Vice President’s Task Force of South Florida, which was headed by then-Vice President George Bush.<sup>15</sup> The Task Force combined efforts from different agencies, such as the DEA and FBI, in order to guard against the increasing amount of drug trafficking in the city.<sup>16</sup> It was created in response to both Nixon’s remarks and the increasing attention to the drug crisis in America.<sup>17</sup> In 1983, the war on drugs thrived under Reagan’s presidency and took a different turn, focusing on the effects drugs were having on the workforce in America.<sup>18</sup> Florida followed suit in July 1983, when state troopers began surveillance on the Florida Turnpike, “pull[ing] over and arrest[ing] sixty-four people for drug-trafficking charges, four times as many as the month before.”<sup>19</sup> The influx was a direct result of the new “drug courier profiles” used by the Florida State Police which “included such characteristics as ‘scrupulous obedience to traffic laws,’ ‘wearing lots of gold,’ and . . . ‘ethnic groups associated with the drug trade.’”<sup>20</sup> The stops made by Florida State Police also consisted of “circl[ing] the car with a drug-sniffing dog.”<sup>21</sup> Of course,

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13. *Frontline: Drug Wars, Thirty Years of America’s Drug War* (PBS television broadcast), available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Nov. 10, 2009).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 187 (1996).

19. *Id.* at 194.

20. *Id.*

21. *Id.*

the only reason for the increased vigilance of Florida's roads was Reagan's aggressive war on drugs.<sup>22</sup>

Not surprisingly, United States legislators responded by proposing mandatory minimum sentences for drug crimes in accordance with the continuing war on drugs.<sup>23</sup> It follows that, though the number of violent offenders in the nation's prisons "has doubled since 1980, the number of drug prisoners has increased sevenfold."<sup>24</sup> Also, Florida currently enforces mandatory minimum sentences for a variety of drug-related crimes, such as trafficking or possession of large amounts of cannabis, cocaine, oxycodone, hydrocodone, methamphetamine and others.<sup>25</sup> These statutes only concern themselves with the weight and the type of drug possessed or sold and do not take into account any previous offenses.<sup>26</sup> Other states, such as New York, have similar harsh statutes.<sup>27</sup> However, earlier this year, New York made strides to eliminate "mandatory minimum sentences for first-time, nonviolent drug offenders."<sup>28</sup> The Rockefeller Drug Laws were originally created in response to the drug war declared in the 1970s and have not been changed since.<sup>29</sup> Lawrence Cipolione, Jr. provided a startling example of the effects of the Rockefeller Drug Laws when he was "sentence[d] [to] fifteen years to life for selling 2.34 ounces of cocaine to an undercover officer. Meanwhile, in the same prison, Amy Fisher was to be released after serving only four years and ten months for shooting a woman in the head."<sup>30</sup> The proposed reform in New York would allow judges broader discretion over sentencing, "would allow some among a group of 1500 prisoners to apply for release, if they are nonviolent and have not been convicted of other crimes,"<sup>31</sup> and would curtail harsh and inequitable sentences, like that handed down to Anthony Papa, a twenty-six year old who was sentenced to fifteen years in prison in 1985 for carrying an envelope which contained 4.5 ounces of cocaine.<sup>32</sup>

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22. *See id.*

23. Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 n.3 (2001).

24. GRAY, *supra* note 2, at 29.

25. *See* Mascharka, *supra* note 23, at 937–38; FLA. STAT. § 893.135 (2008) (stating that most drug trafficking violations carry a mandatory minimum sentence between three and fifteen years).

26. *See* FLA. STAT. § 893.135 (2008).

27. Mascharka, *supra* note 23, at 937.

28. Keith B. Richburg, *N.Y. Governor, Lawmakers Agree to Soften Drug Sentencing Laws*, WASH. POST, Mar. 28, 2009, at A2.

29. *See id.*

30. GRAY, *supra* note 2, at 32.

31. Richburg, *supra* note 28.

32. *See id.* The trial judge in Papa's case claimed he was "handcuffed because of the law" and was forced to sentence Papa to prison, though the judge felt that he deserved proba-

## B. *Downward Departures*

A downward departure occurs when a court imposes “a sentence more lenient than the standard guidelines propose, as when the court concludes that a criminal’s history is less serious than it appears.”<sup>33</sup> In Florida, a downward departure from the lowest sentence, or mandatory minimum, a defendant scores<sup>34</sup> is only permissible under certain “reasonably justified” mitigating circumstances.<sup>35</sup> After giving instances where a court would be allowed to depart from the mandatory minimum sentence, the previous version of the statute warned that under no circumstances should a defendant’s addiction to or abuse of drugs be considered cause to provide for a more lenient sentence, one which could include drug abuse treatment or drug offender probation.<sup>36</sup> While the statute left some room for interpretation,<sup>37</sup> the Legislature made sure that subsection (5) could not be left to the judge’s discretion, as it singled out the one ground which can never be a “reasonably justified” reason for departure.<sup>38</sup> Conversely, a judge had—and still has—much more discretion to give a person more time in prison, even if the defendant does not score prison time.<sup>39</sup> For example, a judge may sentence a person up to the maximum allowed by statute consecutively or concurrently,

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tion as it was Papa’s first offense. *Id.* Papa was eventually released early by Governor Pataki after serving twelve years. *Id.*

33. BLACK’S LAW DICTIONARY 502 (9th ed. 2009).

34. A defendant’s score is based upon a scoresheet created by the legislature for the State Attorney’s use. *See* FLA. STAT. § 921.0014(1)(a) (2008). The scoresheet ranks crimes from one to ten and allots points for each category of crime. FLA. STAT. § 921.0014(1)(b). Furthermore, the scoresheet takes into account the defendant’s prior crimes, primary offense for the current charge, as well as additional offenses for the current charge. *Id.* The score may also increase if there is restitution or victim injury as a result of the crime. *See id.* For example, if there is slight physical injury, the score is increased by four points per slight injury. *See id.* In addition to these points, the statute also assesses points for prior serious felonies (thirty points for a level eight, nine, or ten felony) and possession of a firearm (eighteen sentence points). *Id.* The statute also calls for “sentence multipliers” which also increase the score depending on the type of primary offense committed. FLA. STAT. § 921.0014(1)(b).

35. FLA. STAT. §§ 921.0026, .0016(4) (2008).

36. FLA. STAT. § 921.0026(3) (2008); *see* FLA. STAT. § 948.20 (2009) (discussing drug offender probation).

37. FLA. STAT. § 921.0026(1) (2008) (“Mitigating factors to be considered include, but are not limited to . . .”).

38. *See* Clemens & Stancil, *supra* note 9, at 56 (addressing FLA. STAT. § 921.0016(5) (2008)).

39. *See id.* at 55; *see* FLA. STAT. § 921.0014(2) (2008) (stating that where a defendant scores less than or equal to forty points—which means the defendant does not score mandatory prison time—“the court, in its discretion, may increase the total sentence points by up to, and including, 15 percent”).

giving the judge more leeway and more ability to make the sentence as harsh as possible if he deems the defendant worthy.<sup>40</sup> However, under the old version, if an addicted defendant committed a crime which—taken together with his previous offenses or taken alone—scored him mandatory prison time, the judge could not, even if the judge thought it best, send the defendant to a drug treatment program.<sup>41</sup> These laws prohibiting downward departures, based on the defendant's addiction, lead to such instances where a forty-five year-old father of three received a mandatory minimum sentence of twenty-five years in prison for drug trafficking because he purchased 1200 pills of prescription painkillers.<sup>42</sup> While the Defendant was eventually pardoned by Governor Charlie Crist, the fact still remains that a judge is severely limited by current downward departure and mandatory minimum laws in Florida.<sup>43</sup>

With the new amendments, however, such events will be less likely to occur since the Legislature added paragraph m of subsection 2 to section 921.0026 of the *Florida Statutes*.<sup>44</sup> In this amended version, the statute now allows the judge to depart from the lowest permissible prison sentence so long as the offense is a nonviolent felony and the court finds that the defendant is amenable to the drug treatment services available through drug courts or drug offender probation.<sup>45</sup>

### III. CASE LAW UNDER THE PREVIOUS VERSIONS OF THE *FLORIDA STATUTES*

The amendments proposed by Senate Bill 1726 affected a number of Florida statutes, all of which reference sentencing options for drug offenders.<sup>46</sup> These former versions of the statutes created difficulties for trial judges who could not sentence a particular offender to treatment rather than prison.<sup>47</sup> Because all of these statutes relate to how a judge chooses to sen-

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40. See Clemens & Stancil, *supra* note 9, at 55 (giving an example of a judge who sentenced a defendant to ten years in state prison for "a felony habitual driving while license revoked . . . possessing a small amount of cocaine." The sentence for each charge was five years and the judge decided to run the sentence consecutively rather than concurrently).

41. See *id.* at 56.

42. *Id.* at 57.

43. *Id.* (noting that a pardon like this is rare, and that there are not enough pardons to "prevent the number of injustices that trial court judges could if they had retained traditional sentencing discretion").

44. See Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 580 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 984.345).

45. *Id.* at 583.

46. CS for SB 1726, § 2, 2009 Leg. Reg. Sess. (Fla. 2009) (first engrossed).

47. See *State v. Crews*, 884 So. 2d 1139, 1140 (Fla. 2d Dist. Ct. App. 2004) (stating that the trial judge's only reason for giving the defendant probation, when the defendant scored

tence drug offenders, judges must be careful to “‘give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.’”<sup>48</sup> For this reason, the following cases point to these specific statutes and indicate ways in which the courts decided to interpret them together. Furthermore, these cases illustrate the problems posed by former subsection 3 of section 921.0026 of *Florida Statutes*, as well as the former versions of sections 948.20 and 948.01.

#### A. *Jones v. State*

The Supreme Court of Florida’s decision in *Jones v. State*<sup>49</sup> highlights the positive effects of drug offender probation and other treatment-based drug programs for offenders.<sup>50</sup> However, the case is also proof that the court splits in its interpretation of statutes concerning the sentencing guidelines for drug offenders, as *Jones* was decided by a four-to-three majority, with the Chief Justice at the time, Justice Wells, dissenting.<sup>51</sup> The case revolves around an appeal from a defendant who was denied a downward departure by the appellate court.<sup>52</sup> The defendant, a chronic drug abuser, was charged with possession of crack cocaine.<sup>53</sup> The Supreme Court of Florida reversed the appellate court’s ruling, finding that section 948.01(13) of the *Florida Statutes* allowed the judge the discretion to “place the defendant on drug offender probation [if] the defendant is a chronic [drug] abuser whose criminal conduct is in violation of chapter 893” of the *Florida Statutes* dealing with drug crimes.<sup>54</sup> The Court noted that the plain language of the statute indicated that the legislature meant section 948.01(13) as “an alternative sen-

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mandatory prison time, was because of the defendant’s drug addiction. However, noting that the statutes did not allow such a reason to be valid for the purposes of departures, the appellate court overruled the trial court’s sentencing).

48. *State v. Langdon*, 978 So. 2d 263, 264 (Fla. 4th Dist. Ct. App. 2008) (quoting *For-sythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

49. 813 So. 2d 22 (Fla. 2002).

50. *See id.* at 25–26.

51. *Id.* at 27 (Wells, C.J., dissenting).

52. *Id.* at 24 (majority opinion).

53. *Id.* at 23.

54. *Jones*, 813 So. 2d at 24. When *Jones* was decided in 2002, section 948.01 included subsection 13, which concerned itself with drug offender probation. *See* Fla. Stat. § 948.01(13) (2002). However, in 2004, the Legislature renamed subsection 13 to section 948.20, and titled it “Drug Offender Probation.” *See* FLA. STAT. § 948.20 (2009). In the new section 948.20, a defendant may only qualify for drug offender probation if he or she violated section 893.13(2)(a)—prohibiting the purchase of certain controlled substances—or section 893.13(6)(a)—prohibiting the possession of certain controlled substances. *See State v. Roper*, 915 So. 2d 622, 624 (Fla. 5th Dist. Ct. App. 2005).

tencing scheme for drug abusers that is outside the sentencing guidelines.”<sup>55</sup> By implementing statutes such as section 948.01(13), the legislative intent clearly supported policy favoring treatment over incarceration and the importance of “breaking the revolving door cycle of drugs and crime.”<sup>56</sup> In his dissent, Chief Justice Wells focused on section 921.0026(3) of the *Florida Statutes* and its explicit bar on downward departures based on the defendant’s drug addiction.<sup>57</sup> Wells argued “that the majority fail[ed] to recognize and follow . . . existing precedent in which this Court made clear that sentencing alternatives [such as drug offender probation] should not be used to thwart sentencing guidelines.”<sup>58</sup> The majority and minority opinions speak to the difficulty present in determining legislative intent and interpreting seemingly conflicting statutes regarding the appropriate sentencing of drug abusers.<sup>59</sup>

#### B. State v. Crews

In *State v. Crews*,<sup>60</sup> the defendant was charged and convicted of delivery of cocaine within 1000 feet of a school, which carried a mandatory minimum sentence of three years in state prison, as well as one charge of possession of cocaine.<sup>61</sup> However, the trial court sentenced the defendant to 18 months imprisonment for the first charge, followed by 18 months of probation for the second charge.<sup>62</sup> While “section 893.13(1)(c)(1) provides that a person who commits the crime of delivering cocaine within 1000 feet of a school ‘must be sentenced to a minimum term of imprisonment of 3 calendar years,’” the trial court judge departed from the minimum sentence because of the defendant’s drug addiction.<sup>63</sup> In this case, the appellate court focused on the application of section 948.01 of the *Florida Statutes* to the defendant’s circumstances.<sup>64</sup> Section 948.01 states that a court may place a defendant on probation if the defendant is “not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require

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55. *Jones*, 813 So. 2d at 24.

56. *Id.* at 27 n.5.

57. *Id.* at 28 (Wells, C.J., dissenting).

58. *Id.*

59. *See generally id.*

60. 884 So. 2d 1139 (Fla. 2d Dist. Ct. App. 2004).

61. *Id.* at 1140.

62. *Id.*

63. *Id.* (quoting FLA. STAT. § 893.13(1)(c)(1) (2009)). “‘The only reason I can give [the departure] is the drug addiction.’” *Id.*

64. *Crews*, 884 So. 2d at 1141–42.

that the defendant presently suffer the penalty imposed by law . . . .”<sup>65</sup> The appellate court found that the statute “appear[ed] to apply broadly to permit a judge to withhold a sentence and impose a term of probation in lieu of imprisonment;” however, such an interpretation had been barred by the Supreme Court of Florida.<sup>66</sup> Basing its interpretation of the application of section 948.01 on previous rulings, the appellate court found that, since section 893.13(1)(c)(1) was enacted after section 948.01, the trial court was prohibited from sentencing the defendant to probation despite his addiction.<sup>67</sup> The appellate court also noted that issuing probationary sentences when the scoresheet called for a minimum term of imprisonment was considered a downward departure.<sup>68</sup> The court finally noted that the trial court was further barred from its downward departure due to section 921.0026(3) of the *Florida Statutes*, which states that a defendant’s addiction can never be considered as a valid reason for departure and reversed the trial court’s ruling.<sup>69</sup>

### C. State v. Roper

In *State v. Roper*,<sup>70</sup> the appellate court reversed the lower court’s ruling, sentencing the Defendant to drug offender probation for five years—though he scored a mandatory 17.925 months in state prison—because the trial court found the Defendant to be a chronic drug user.<sup>71</sup> In its analysis, the appellate court noted that the Defendant wrongfully relied on the Supreme Court of Florida’s decision in *Jones* because that court concerned itself with the previous version of the drug offender statute.<sup>72</sup> Because the new version of the drug offender statute did not include the Defendant’s offense of delivery and possession of a controlled substance with intent to sell, the trial court erred

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65. *Id.* at 1141 (quoting FLA. STAT. § 948.01 (2008)).

66. *Id.* at 1141–42.

In *McKendry*, the [S]upreme [C]ourt [of Florida] . . . noted “accepted rules of statutory construction” that “a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms” and “when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent.”

*Id.* at 1142 (quoting *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994)).

67. *Id.* at 1143.

68. *Crews*, 884 So. 2d at 1143 (citing *State v. VanBebber*, 848 So. 2d 1046, 1053 (Fla. 2003) (per curiam); *State v. Scott*, 879 So. 2d 99, 100 (Fla. 2d Dist. Ct. App. 2004); *State v. Brannum*, 876 So. 2d 724, 725 (Fla. 5th Dist. Ct. App. 2004)).

69. *Id.*; see FLA. STAT. § 921.0026(3) (2002) (amended by Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 1, 1 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 985.345)).

70. 915 So. 2d 622 (Fla. 5th Dist. Ct. App. 2005).

71. *Id.* at 623.

72. *Id.* at 624.



when it sentenced the Defendant to drug offender probation.<sup>73</sup> Though the court realized that the Defendant was a good candidate for drug offender probation given his addiction to drugs, the appellate court noted that the trial court had no authority to depart from the mandatory minimum without a valid reason.<sup>74</sup> Unfortunately, though, there was a better alternative for the Defendant, the court's hands were tied by the statute and mandatory sentencing guidelines.<sup>75</sup>

#### D. State v. Langdon

Finally, the appellate court in *State v. Langdon*<sup>76</sup> reiterated that “[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.”<sup>77</sup> In doing so, the court ruled that the lower court's decision to place the Defendant, who was charged with “possession of cocaine with intent to sell or deliver,” on drug offender probation was an impermissible downward departure.<sup>78</sup> The court found that a close inspection of the relevant statutes revealed that *Florida Statutes* section 948.034 did not permit a defendant to enter into a community residential drug center if the defendant had previous felony convictions which were not drug related.<sup>79</sup> Because the Defendant had multiple prior possession of cocaine convictions and a prior conviction for grand theft, the Defendant was not eligible for the “alternative to the sentencing guidelines” offered by the trial court.<sup>80</sup> The appellate court's interpretation of the relevant statutes was contrary to how the trial court interpreted the statutes.<sup>81</sup> The trial court did not read section 948.034 with sections 893.13 and 921.187 because section 948.034 did not reference the later sections; however, the appellate court explained that it does not matter if the statutes reference each other specifically.<sup>82</sup> Rather, it is enough that the sta-

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73. *Id.*

74. *Id.* (citing *State v. Tyrrell*, 807 So. 2d 122, 125 (Fla. 5th Dist. Ct. App. 2002)).

75. *Roper*, 915 So. 2d at 624; see *Clemens & Stancil*, *supra* note 9, at 55.

76. 978 So. 2d 263 (Fla. 4th Dist. Ct. App. 2008).

77. *Id.* at 264 (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

78. *Id.* at 263.

79. *Id.* at 264; see FLA. STAT. § 948.034 (2009) (explaining the criteria for entering a residential drug treatment center).

80. *Langdon*, 978 So. 2d at 264–65.

81. *Id.* at 265.

82. *Id.*; see FLA. STAT. § 921.187(1)(a) (2009) (explaining that a defendant who commits certain drug crimes may be required to serve a term of probation in light of serving time in prison); FLA. STAT. § 893.13(10)–(11) (2009) (stating, in relevant part, that in order to qualify for residential drug treatment or probation, the defendant must not have been convicted of any

tutes “deal with sentencing combined with drug abuse control.”<sup>83</sup> The policy behind the interpretation, the court noted, was that sentencing alternatives in criminal cases were to be “used in a manner that [would] best serve the needs of society, punish criminal offenders, and provide the opportunity for rehabilitation.”<sup>84</sup>

#### IV. WHAT CHANGED: SENATE BILL 1726’S AMENDMENTS TO *FLORIDA’S STATUTES*

In its analysis report on Senate Bill 1726, the Florida Senate explained that the “bill expands the potential use of postadjudicatory treatment-based drug court programs as a sentencing option for a limited, specified group of nonviolent felony defendants.”<sup>85</sup> The report also states that the bill will have positive fiscal impacts, specifically that the changes will save approximately \$11.8 million in prison costs due to the reduced amount of offenders convicted.<sup>86</sup> In addition to focusing on the statutes mentioned above, the bill also makes changes to section 397.334 of the *Florida Statutes*, which deals with Florida’s drug courts.<sup>87</sup> Accordingly, the bill analysis repeatedly references one legislative group’s research regarding the state of drug courts in Florida.<sup>88</sup> For this reason, this section will begin with a brief description and background on Florida’s drug court system as it is explicitly connected with downward departures and sentencing alternatives. The rest of this section will focus on the various statutes affected by the bill and the positive changes the bill makes to the previous legislation.

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other felonies, other than those drug crimes listed, including possession, purchase, selling/delivering of certain drugs).

83. *Langdon*, 978 So. 2d at 265.

84. *Id.* (quoting FLA. STAT. § 921.187(1)).

85. Fla. S. Comms. on Crim. and Civil Just. Appropriations, PCS for SB 1726 (2009) Staff Analysis 1 (Mar. 27, 2009), available at <http://www.flsenate.gov/data/session/2009/Senate/bills/analysis/pdf/2009s1726-pcs.ja.pdf> [hereinafter SB 1726 Staff Analysis].

86. *Id.*

87. *Id.*; see FLA. STAT. § 397.334 (2008).

88. See SB 1726 Staff Analysis, *supra* note 85, at 2 (citing FLA. LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, REPORT NO. 09–13, 2 (Mar. 2009), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0913rpt.pdf> [hereinafter OPPAGA]).

## A. The Amendments' Impact on Drug Courts

### 1. Florida's Drug Court System

The drug court program started in Miami, Florida by then-Circuit Court Judge Herbert Klein in 1989.<sup>89</sup> Judge Klein believed that a specialized treatment program like drug courts was the best way to handle the increase of drug cases nation-wide.<sup>90</sup> As one judge explained, “[b]asically, we have had a revolving door phenomenon where we take an offender, lock him up for whatever appropriate period of time, and have him back out in the community without addressing the underlying source of his criminal behavior.”<sup>91</sup> This “revolving door” refers directly to the high recidivism rates for drug offenders which continues today.<sup>92</sup> The national recidivism rate ranges from sixty-five to eighty percent, meaning that between sixty-five and eighty percent of drug “offenders continue to commit crimes after being released from custody.”<sup>93</sup> Furthermore, the Bureau of Justice Assistance found that “only 28% of prisons had substance abuse programs, and that only 7% of those programs provided a comprehensive level of services that included drug counseling, treatment, and transitional planning.”<sup>94</sup> Because of this information, Florida’s drug courts strive to provide rehabilitation and “proactive court monitoring of offenders while in treatment” in order to reduce recidivism.<sup>95</sup> A drug offender placed in either the pretrial or postadjudicatory<sup>96</sup> drug court can expect to receive increased, personalized, and constant supervision provided in large part by the judge himself.<sup>97</sup> Drug courts not only reduce reci-

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89. REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 3.

90. *Id.*; see also Andrew Armstrong, Comment, *Drug Courts and the De Facto Legalization of Drug Use for Participants in Residential Treatment Facilities*, 94 J. CRIM. L. & CRIMINOLOGY 133, 139–40 (2003).

91. *Armstrong*, *supra*, note 90 at 140 (quoting JAMES L. NOLAN, REMEMBERING JUSTICE: AMERICAN DRUG COURT MOVEMENT 45 (2003)).

92. Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1491 (2000).

93. *Id.* at 1491 n.52.

94. *Id.* at 1492.

95. REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 4.

96. OPPAGA, *supra* note 88, at 2 (noting that the pretrial division of the drug court program is formatted for first-time drug offenders are placed in county probation rather than in state prison. Usually, after the offender has successfully completed the program, his or her charges are dropped. Postadjudicatory programs cater to “non-violent drug addicted offenders who typically have prior convictions.” After the offender completes the program, the consequences of their charges are usually mitigated and adjudication withheld).

97. See REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 4 (“[J]udge[s] monitored offenders through frequent court appearances to encourage good behavior and sanctioned non-compliance in a more informal, stream-lined, and structured process.”).

divism by providing the treatment a prison cannot, they also reduce costs substantially.<sup>98</sup> The eligibility for drug courts depends on the criteria set by the individual circuit drug court programs; however, most only service “offenders who have non-violent felony drug or drug-related offenses and who have no history of violence, drug trafficking, or drug sales.”<sup>99</sup>

## 2. Modifications to *Florida Statutes* Section 397.334

Section 397.334 of the *Florida Statutes* describes and allows for the drug court system in Florida.<sup>100</sup> The Florida Legislature enacted section 397.334 in 2001 after the Supreme Court Task Force on Treatment-Based Drug Courts proposed that the legislature take action and “require[] each judicial circuit to establish a treatment-based drug court program.”<sup>101</sup> In addition, section 397.334 calls on the drug courts to establish and adhere to ten components of drug courts.<sup>102</sup> The rest of section 397.334 establishes administrative guidelines for drug courts.<sup>103</sup> The amendments passed in May 2009 add to section 397.334 by giving the judge certain qualifications for allowing an offender to take advantage of the drug court program as a form of downward departure.<sup>104</sup> Furthermore, the amendments provide that offenders in the drug court program who violate their probation solely based on a failed

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98. *Id.* at 11–12. The National Association of Drug Court Professionals reported that “incarceration of drug offenders costs [range] between \$20,000 and \$50,000 a year.” *Id.* at 11. However, “participation in drug court costs” [only] \$2500 to \$4000 per person. *Id.*

99. OPPAGA, *supra* note 88, at 2.

100. FLA. STAT. § 397.334 (2009).

101. REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 8.

102. FLA. STAT. § 397.334(4)(a)–(j). These ten components are:

(a) Drug court programs integrate alcohol and other drug treatment services with justice system case processing; (b) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights; (c) Eligible participants are identified early and promptly placed in the drug court program; (d) Drug court programs provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services; (e) Abstinence is monitored by frequent testing for alcohol and other drugs; (f) A coordinated strategy governs drug court programs responses to participants’ compliance; (g) Ongoing judicial interaction with each drug court program participant is essential; (h) Monitoring and evaluation measure the achievement of program goals and gauge program effectiveness; (i) Continuing interdisciplinary education promotes effective drug court program planning, implementation, and operations; (j) Forging partnerships among drug court programs, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

*Id.*

103. *See* FLA. STAT. § 397.334.

104. *See* FLA. STAT. § 397.334(3)(a) (stating that entry into the program “as a condition of probation or community control” by the sentencing judge “must be based upon the sentencing court’s assessment of the defendant’s criminal history, substance abuse, . . . amenability to the services of the program, [and] total sentence points”).

substance abuse test will have the violation dismissed.<sup>105</sup> These additions stress the importance of the offender's need for treatment and rehabilitation which the former version of the statute failed to do.<sup>106</sup> The former version of section 397.334 explained that the purpose of drug courts in Florida was to process offenders with substance abuse problems "in such a manner as to appropriately address the severity of the identified substance abuse problem through treatment services tailored to the individual needs of the participant."<sup>107</sup> However, the statute remained silent as to what specifically about the offender's needs the judge should inquire about when considering whether the offender should be moved to the drug court program as a sentencing alternative.<sup>108</sup> The additions, conversely, now require the judge to think about the offender's personal criminal history along with his or her individual substance abuse, which may lead to an increase of offenders who receive treatment.<sup>109</sup> As more offenders enter drug court rather than prison, the recidivism rate will continue to decrease among offenders while public safety and savings will increase.<sup>110</sup> Additionally, the changes to section 397.334 make drug courts more forgiving as offenders begin weaning themselves off drugs.<sup>111</sup> As previously noted, drug court judges now must dismiss violations of the drug court's terms when those violations are due to failing drug tests, recognizing that substance abusers have a difficult time resisting drugs during the beginning stages of treatment.<sup>112</sup> Overall, the amendments to section 397.334 not only reinforce the individuality of drug courts and increase the chances that an offender may be granted a downward departure to participate in drug courts, but they also direct drug court judges and sentencing judges towards treatment rather than punishment.<sup>113</sup>

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105. FLA. STAT. § 397.334(3)(b).

An offender who is sentenced to a postadjudicatory drug court program and who . . . is the subject of a violation of probation or community control . . . based solely upon a failed or suspect substance abuse test administered . . . shall have the violation of probation or community control heard by the judge presiding over the postadjudicatory drug court program. The judge shall dispose of any such violation, after a hearing on or admission of the violation . . .

*Id.*

106. See FLA. STAT. § 397.334.

107. FLA. STAT. § 397.334(1) (2008).

108. See FLA. STAT. § 397.334.

109. See FLA. STAT. § 397.334(3)(a)(2009); see SB 1726 Staff Analysis, *supra* note 85.

110. See OPPAGA, *supra* note 88, at 4–5.

111. See *id.*

112. See FLA. STAT. § 397.334(3)(b).

113. See FLA. STAT. § 397.334.

### B. *The Amendments' Impact on Downward Departures*

While the change to section 921.0026(2) of the *Florida Statutes* is not as extensive as the amendments to section 397.334, what the new act adds will have a significant impact on sentencing in Florida.<sup>114</sup> As stated earlier, section 921.0026(2) describes mitigating circumstances which could permit a judge to give an offender a lesser sentence than the offender stands to receive via the sentencing scoresheet.<sup>115</sup> Previously, subsection 3 indicated that an offender's substance abuse or addiction could never be used as a mitigating circumstance.<sup>116</sup> However, the new additions to section 921.0026 explicitly allow for the sentencing court to take into consideration the defendant's substance abuse as long as the defendant scores fifty-two sentence points or fewer, is amenable to treatment-based drug court, is eligible to participate in the program, and was charged with a nonviolent felony.<sup>117</sup> This amendment works in conjunction with the changes to drug courts and drug offender probation as it permits the sentencing judge to give a drug offender a chance to complete one of these programs even though he or she may score mandatory prison time.<sup>118</sup> Allowing downward departures based on the defendant's substance abuse or addiction indicates that the legislature realized that in order to control the increased prison admission rates and expenses, it would have to modify its blanket statement forbidding downward departures based on substance abuse in every circumstance.<sup>119</sup> Savings to society, however, also make the amendments to section 921.0026 worthwhile since "hurt people hurt people," meaning that by limiting drug treatment availability to offenders, drug addicted offenders will likely commit violent crimes to others.<sup>120</sup> Other monetary and societal benefits include keeping prisons full of actual violent-offenders rather than those who are drug-addicted.<sup>121</sup> By giving the judge additional discretion, the judge may place a defendant in drug court or drug offender probation rather than sending him or her to jail, where

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114. See FLA. STAT. § 921.0026 (2009).

115. FLA. STAT. § 921.0026(2) (2008).

116. FLA. STAT. § 921.0026(3) (2008).

117. FLA. STAT. § 921.0026(2)(m) (2009).

118. See *id.*

119. See SB 1726 Staff Analysis, *supra* note 85, at 1; see also 2007–2008 FLA. DEP'T OF CORR. ANN. REP., *supra* note 3, at 16 (stating its expenditures for one prisoner per year totals \$20,108); GRAY, *supra* note 2, at 36 (stating that prison overcrowding, which drains state budgets, is due in large part to mandatory minimums).

120. See GRAY, *supra* note 2, at 189.

121. See *id.* at 36 ("[W]ardens throughout the country are routinely forced to grant an early release to violent offenders so that nonviolent *drug* offenders can serve their sentences in full.").

the drug addict may end up taking a bed that a rapist or other violent offender could have occupied.<sup>122</sup>

### C. *The Amendments' Impact on Drug Offender Probation*

#### 1. Drug Offender Probation in Florida

Drug offender probation is a type of court ordered probation which "is a more intensive form of supervision."<sup>123</sup> An offender may be put in drug offender probation either as a condition of his or her deal with the State Attorney, as a part of the judge's sentence, or through the Florida Parole Commission.<sup>124</sup> Drug offender probation includes the standard supervisions of regular probation combined with special conditions tailored to the needs of the offender.<sup>125</sup> For example, a judge may require a drug offender to attend Narcotics Anonymous meetings, keep a curfew, get drug tested regularly, or attend an inpatient or outpatient drug treatment program.<sup>126</sup> Drug offender probation, like any type of probation, constitutes a sentencing alternative and downward departure since probation provides a way for an offender to avoid spending his or her whole sentence in state prison, and, like drug courts, reinforces "rehabilitation rather than punishment."<sup>127</sup> Furthermore, judges view drug offender probation as a privilege rather than a right and reserve the broad discretion of determining what the individual offender deserves or requires as conditions of probation.<sup>128</sup> However, just as a judge has the discretion to place an offender in drug offender probation, a judge is equally given the discretion to determine whether the probation has been violated and hand down a prison sentence.<sup>129</sup>

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122. *See id.*

123. 2007–2008 FLA. DEP'T OF CORR. ANN. REP., *supra* note 3, at 71.

124. *See id.*

125. *Id.*

126. *See id.*

127. *Lawson v. State*, 969 So. 2d 222, 229 (Fla. 2007) (quoting *Bernhardt v. State*, 288 So. 2d 490, 495 (Fla. 1974)).

The underlying concept of probation is rehabilitation rather than punishment and presupposes the fact that probationer is not in prison confinement. The purpose of the granting of probation . . . is rehabilitation of one who has committed the crime charged without formally and judicially branding the individual as a convicted criminal and without consequent loss of civil rights and other damning consequences.

*Bernhardt*, 288 So. 2d at 495 (citations omitted).

128. *Lawson*, 969 So. 2d at 229.

129. *See id.*

## 2. Modifications to *Florida Statutes* Section 948.20

The pre-amended version of section 948.20 of the *Florida Statutes* explains that, in order to qualify for drug offender probation, the defendant must have been charged with either purchasing or possessing narcotics in addition to being a chronic substance abuser.<sup>130</sup> The statute further provides that the judge may “stay and withhold the adjudication of guilt [or] . . . stay and withhold the imposition of sentence and place the defendant on drug offender probation” or into a postadjudicatory treatment-based drug court program in lieu of a prison sentence.<sup>131</sup> The amended version of the statute expands the eligibility requirements for drug offender probation by allowing defendants who have committed a burglary, trespassing, or other nonviolent felony to qualify for drug offender probation.<sup>132</sup> Additionally, the amendment also states that no matter what nonviolent felony the defendant has been charged with, the defendant’s total sentence scoresheet points must not exceed fifty-two.<sup>133</sup> The expanded qualifications only affect those who committed crimes on or after July 1, 2009, however, preventing these amendments from reaching back and affecting previous cases and rulings.<sup>134</sup> Because drug offender probation is linked to drug courts, the changes to section 948.20 will likely have the same positive fiscal and societal impacts as the changes to section 397.334.<sup>135</sup>

### D. *Why Change?*

As noted before, the anti-drug sentiment created by Nixon’s “War on Drugs” influenced many legislatures to create harsh drug laws and strict sentencing guidelines for drug offenders, which swiftly increased prison popula-

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130. FLA. STAT. § 948.20 (2008) (explaining that the court must hold a hearing to determine that the defendant qualifies as a chronic substance abuser).

131. *Id.*

132. Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 583 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 948.345).

“Forcible felony” means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

FLA. STAT. § 776.08 (2009).

133. Ch. 2009-64, 2009 Fla. Laws at 583.

134. *See id.*

135. *See Lawson v. State*, 969 So. 2d 222, 232 (Fla. 2007); SB 1726 STAFF ANALYSIS, *supra* note 85, at 1.



tions.<sup>136</sup> The harsh drug laws translate into law enforcement officials who focus their efforts on incarcerating drug addicts rather than violent criminals—which further reinforce a national “demonization” of drug addicted criminals.<sup>137</sup> While changing, many Americans still believe drug addiction is a choice and drug addicts should be jailed to keep them off the streets.<sup>138</sup> In decades past, these feelings were steered towards alcoholics during the time of prohibition; however, many realize today that alcoholism is a disease which can—and should—be treated rather than punished.<sup>139</sup> Unfortunately, these feelings are not as widely applied to drug addicts, although there has been increased education and awareness about drug addiction.<sup>140</sup> For example, Florida’s Office of Drug Control emphasizes that, while “[t]he initial decision to take drugs is often voluntary,” drug users crave drugs so much so that their bodies cannot function without the drugs and drug addicts reach a point where they can no longer exert self-control.<sup>141</sup> Further, “[b]ecause of the way drug use alters the structure and function of the brain, drug addiction is regarded as comparable to other diseases like heart disease.”<sup>142</sup> Due to reports like this and others which bring drug addiction into the medical, rather than the criminal arena, legislatures, like Florida, have amended their harsh drug laws to accommodate for drug treatment.<sup>143</sup> Furthermore, the changes reflect the increased attention on the constitutionality of strict drug laws and make efforts to end the criminalization of drug addicts.<sup>144</sup>

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136. See generally BAUM, *supra* note 18, at 259 (discussing an instance in 1988 where Florida State University economists discovered that drug arrests in Florida doubled since 1982). Skeptical, the economists compared their statistics with those from Illinois. *Id.* They found the same thing: “Drug arrests in Illinois rose 69 percent” in ten years. *Id.*

Florida and Illinois were typical in their zeal to send drug offenders to prison at the expense of incarcerating other, perhaps more dangerous, criminals. The War on Drugs doubled the nation’s prison population during the Reagan administration. The portion of state prisoners inside for drugs went from one in fifteen to one in three, and 85 percent were in for mere possession.

*Id.*

137. See GRAY, *supra* note 2, at 123.

138. See *id.*

139. *Id.* at 124.

140. See *id.* at 123 (discussing one professor at the University of California at Irvine who invites drug addicts from a local treatment center to his classroom to help students realize that drug addicts are humans with “needs and desires, goals and failings, just like everyone else”).

141. FLORIDA’S DRUG CONTROL STRATEGY, *supra* note 1, at 68.

142. *Id.*

143. See Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 578-85 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 948.345).

144. GRAY, *supra* note 2, at 124-25 (explaining that many current drug laws violate the precedent set by the United States Supreme Court which held that punishing a person “for the disease of drug addiction violated the Constitution’s prohibition on cruel and unusual punishment”).

## V. THE CHANGES APPLIED TO EARLIER CASES

While the changes Senate Bill 1726 made to how drug offenders are sentenced seem positive on paper, the actual effects of the act have not yet been seen. However, this section attempts to predict how practical these changes are by using the fact patterns from previous cases and applying the new versions of the statutes to those defendants to determine if the defendants would have had different outcomes. This section does not discuss *Jones* since the amendments would not have changed the outcome of the defendant's case.

In *Crews*, the Defendant was charged with delivery of cocaine within 1000 feet of a school and possession of cocaine.<sup>145</sup> The trial judge chose to give the Defendant a downward departure based on his drug addiction, which the appellate court found to be against the explicit language of section 921.0026 of the *Florida Statutes*.<sup>146</sup> The appellate court's decision hinged on sections 921.0026 and the 2004 version of 948.01, both of which were changed by Senate Bill 1726.<sup>147</sup> If the Defendant had been tried under the new amendments, the appellate court may have found that the trial court judge's downward departure was not an abuse of discretion, as the new laws explicitly allow judges to consider substance abuse as the sole factor for departure.<sup>148</sup> Furthermore, since Senate Bill 1726 stresses rehabilitation over incarceration, the Defendant would have qualified for drug offender probation under revised section 948.20.<sup>149</sup> The appellate court ruled that section 948.034 barred the Defendant from enrolling in probation because the statute did not list the Defendant's charge as one which qualifies; however, section 948.20 indicates that a defendant qualifies for drug offender probation as long as the court finds the defendant is a chronic substance abuser and has committed any nonviolent felony.<sup>150</sup> In *Crews*, the trial judge would have been given more discretion in his sentencing and, while it could still be ap-

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145. *State v. Crews*, 884 So. 2d 1139, 1140 (Fla. 2d Dist. Ct. App. 2004).

146. *Id.* at 1140, 1143.

147. *See id.* at 1142-43; CS for SB 1726, §2, 2009 Leg. Reg. Sess. (Fla. 2009) (first engrossed).

148. *See* ch. 2009-64, 2009 Fla. Laws at 580. Departure from the lowest permissible sentencing for substance abuse convictions is subject to the defendant's Criminal Punishment Code scoresheet totaling less than fifty-two points and a court determination "that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program." *Id.*

149. *See id.*

150. *See Crews*, 884 So. 2d at 1140; ch. 2009-64, 2009 Fla. Laws at 583.

pealed, the appellate court would have likely upheld the trial court's sentencing based on the amendments the new law provides.<sup>151</sup>

In *Roper*, the Defendant was charged with delivery and possession of cocaine with intent to sell or deliver.<sup>152</sup> The Defendant scored almost eighteen months in state prison, yet the trial court found that he "was a chronic drug user, and placed him on drug offender probation for five years."<sup>153</sup> The appellate court overruled that sentence finding that the statute did not allow for the Defendant to enter drug offender probation.<sup>154</sup> Under the new version, Mr. Roper would have been one of the many affected and spared prison since the amendment includes all nonviolent felonies as qualified charges for drug offender probation.<sup>155</sup> In this case, the appellate court fully relied on section 948.20; therefore, Mr. Roper's fate certainly would have been different.<sup>156</sup> The final paragraph of the appellate court's decision reinforces that many courts are restricted to the statutes regardless of whether they believe the sentence is appropriate for the defendant or not:

[w]e acknowledge the good intentions of the trial judge to offer drug treatment to Mr. Roper, . . . [n]evertheless, . . . [t]he Criminal Punishment Code requires a sentencing court to impose not less than the lowest permissible sentence calculated on the scoresheet, unless there is evidence that supports a valid reason for a downward departure.<sup>157</sup>

It follows that this sentiment and similar rulings influenced the legislature to amend the sentencing statutes.<sup>158</sup>

Finally, in *Langdon*, the appellate court found that the trial court granted the Defendant a downward departure for which she did not qualify.<sup>159</sup> The appellate court revoked the defendant's sentence due to section 948.034's stipulation that the Defendant have no prior non-drug felony convictions.<sup>160</sup> Again, the court's ruling would have been different if the amendments were effective in 2008, as the Defendant would have been able

151. See ch. 2009-64, 2009 Fla. Laws at 580, 583.

152. State v. Roper, 915 So. 2d 622, 623 (Fla. 5th Dist. Ct. App. 2005).

153. *Id.*

154. *Id.* at 623–24. Again, note that the statute prior to the amendments only provided drug offender probation to a defendant who was charged with possession or purchase of controlled substances. See FLA. STAT. § 948.20 (2008).

155. See ch. 2009-64, 2009 Fla. Laws at 583.

156. See *Roper*, 915 So. 2d at 624.

157. *Id.*

158. See SB 1726 STAFF ANALYSIS, *supra* note 85, at 1–4.

159. State v. Langdon, 978 So. 2d 263, 263 (Fla. 4th Dist. Ct. App. 2008).

160. *Id.* at 264.

to receive a downward departure based on her substance addiction or, alternatively, she could have qualified for drug offender probation under *Florida Statutes* section 948.20, despite her previous non-drug related felony charge.<sup>161</sup> Because both sections 948.20 and 948.034 speak to the requirements of drug offender probation, the *Langdon* court would now be able to use section 948.20's standards.<sup>162</sup> The court voiced the policy behind their ruling, indicating that if the relevant statutes were read together, they would show that the legislature intended the court to make their determinations of the availability of sentencing alternatives based on the "'manner that will best serve the needs of society, punish criminal offenders, and provide the opportunity for rehabilitation.'"<sup>163</sup> Had the revised version of section 948.20 been available to the court, application of this policy would have prevented the Defendant from incarceration.<sup>164</sup>

These cases merely provide a sampling of defendants whose fates would have changed had the amendments been in effect when they were tried. However, it is safe to assume that many more drug addicted offenders would be out of jail and in treatment centers, or postadjudicatory treatment programs, had the amendments been instituted earlier, specifically because of the explicit nature of the former version of section 921.0026 subsection 3 of the *Florida Statutes*.<sup>165</sup>

## VI. IS SENATE BILL 1726 MERELY A BAND-AID?

While the changes effectuated by Senate Bill 1726 certainly increase a judge's discretion in sentencing drug offenders, the act does not reach a substantial amount of drug addicted offenders in need of treatment. For example, in order to qualify for a downward departure based on substance abuse, the offender must not be charged with a violent felony.<sup>166</sup> Additionally, the new version of the statute reads that the offender must not score above fifty-two points on his or her scoresheet.<sup>167</sup> This poses a problem for offenders who commit aggravated battery or assault on law enforcement officers, a crime which is not only violent, but also carries a higher score than most

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161. See *id.*; ch. 2009-64, 2009 Fla. Laws at 580, 583.

162. See *Langdon*, 978 So. 2d at 264 (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

163. *Id.* at 265 (quoting FLA. STAT. § 921.187(1) (2008)).

164. See *id.*

165. See FLA. STAT. § 921.0026(3) (2002) ("[T]he defendant's substance abuse or addiction . . . is not a mitigating factor . . . and does not, *under any circumstances*, justify a downward departure from the permissible sentencing range." (emphasis added)).

166. Ch. 2009-64, 2009 Fla. Laws at 580.

167. *Id.*

drug charges.<sup>168</sup> Such a violent crime may be one of the most common among drug abusing offenders under the influence at the time of their arrest, especially if they are taken by surprise or do not understand why they are being arrested given their altered state of mind.<sup>169</sup> Furthermore, with the sentencing points capped at fifty-two, an offender with an extensive record may not qualify for a downward departure, drug offender probation, drug court or regular probation, or community control.<sup>170</sup> While the legislature intended to create a bill that would alleviate the growing prison admission rates and stress on taxpayer dollars, they failed to realize that their changes would still leave judges scratching their heads when faced with a serious drug abuser, who scores more than fifty-two points or is charged with a violent crime.<sup>171</sup> By doing so, the legislature continues to leave judges and their invaluable discretion out of the equation.<sup>172</sup>

Moreover, Senate Bill 1726 proposes that, in order for the court to determine whether the defendant qualifies for drug court or a downward departure, the sentencing court must conduct a substance abuse screening and determine if the defendant is amenable to treatment.<sup>173</sup> However, the act does not discuss the method of evaluating substance abuse or amenability.<sup>174</sup> Additionally, revised section 948.20 of the *Florida Statutes*, calls for a hearing to determine whether the defendant is a chronic substance abuser; yet again, the statute fails to indicate what the hearing entails.<sup>175</sup> It does indicate,

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168. See FLA. STAT. § 776.08 (2009) (stating that aggravated battery or assault is a violent crime); FLA. STAT. § 921.0012 (2008) (listing aggravated battery and assault on a law enforcement officer as level six and seven offenses, respectively, as opposed to common drug crimes which are a level four offense).

169. See FLORIDA'S DRUG CONTROL STRATEGY, *supra* note 1, at 39.

The 2006 National Crime Victimization Survey asked victims of violent crimes [including assault] . . . about their perceptions of the offender's use of . . . drugs. In the 54% of violent crimes in which the victim formed an opinion, 27% perceived the offender to be under the influence of alcohol or other drugs.

*Id.*

170. See ch. 2009-64, 2009 Fla. Laws at 580-83.

171. See SB 1726 Staff Analysis, *supra* note 85, at 1, 3.

172. See Clemens & Stancil, *supra* note 9, at 54.

[T]he Florida Legislature snatched discretion in criminal sentencing from the hands of judges. . . . Many judges are experienced former prosecutors or criminal defense lawyers who have been handling cases for decades. More importantly, all trial judges must individually stand for election . . . every six years, where any individual sentence perceived as too light could weigh heavily in the electorate's mind. But still, the legislature removed sentencing discretionary to nonelected assistant state attorneys, whose zeal may be untempered by experience or electorate accountability.

*Id.*

173. See ch. 2009-64, 2009 Fla. Laws at 579-80.

174. See *id.*

175. See *id.* at 583.

though, that the “state attorney and victim, if any” may offer recommendations for the drug offender regarding their entry into a drug court program, leading one to believe that the fate of drug offenders may be left in the hands of a state attorney or victim rather than a judge.<sup>176</sup> Again, the act is vague as to what kind of drug addicted offender may qualify for these treatment programs beyond the bare sentencing point score and the requirement that the defendant be a chronic substance abuser.<sup>177</sup> While the purpose of the phrase “amenable to treatment” is important as it may help prevent a decrease in rates of drug court graduation,<sup>178</sup> it just creates more ambiguity as to the level of discretion the judge actually has.<sup>179</sup> Does this mean that the judge determines if the defendant is amenable or should the state attorney come to this conclusion?<sup>180</sup> Due to these unanswered questions, the court’s discretion may become limited by an adamant state attorney or victim who believes that the defendant should not be rewarded by drug offender probation or drug court treatment.<sup>181</sup>

As noted before, the act forges new paths to allow more drug addicted offenders to enter into treatment-based programs.<sup>182</sup> However, the legislature did not recognize that counties in Florida already have eligibility requirements in place; requirements which usually state that the defendant must have no prior felony convictions or be charged with a non-drug offense.<sup>183</sup> The act lacks reference to these requirements set up by the counties and does not mandate that the counties change them.<sup>184</sup> Because of this oversight, it is possible for counties to retain their rules for an indeterminate amount of time, until the legislature mandates that the rules change. In this sense, the act, while very appealing on the surface, does not pack the power needed to overhaul the state’s current system of properly sentencing drug addicted defendants.

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176. *See id.* at 579.

177. *See id.* at 580, 583.

178. *See* OPPAGA, *supra* note 88, at 4 (“[W]hile drug court graduates have lower recidivism rates, only half of participants complete the program, and many non-completers are re-arrested and subsequently sentenced to prison.”).

179. *See* ch. 2009-64, 2009 Fla. Laws at 579.

180. *See id.*

181. *See id.*

182. *See id.* at 579–83.

183. *See* REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at app. B.

184. *See* ch. 2009-64, 2009 Fla. Laws at 579 (explaining that entrance into a drug court program is pursuant to section 948.01 or 948.20). Section 948.01 states that a defendant is eligible for drug court as long as the defendant is a nonviolent offender, scores fifty-two points or below, and is amenable to treatment. FLA. STAT. § 948.01(7) (2009).

## VII. CONCLUSION

The new legislation enacted by the Florida Legislature on May 27, 2009 will greatly change how judges and both defense and state attorneys think about sentencing drug addicted defendants. Thankfully, the time has finally come in Florida for courts to treat drug addicts like they really are—individuals in need of treatment, not incarceration. However, while the change is noteworthy, the legislation is not nearly as revolutionary as the times call for. With society becoming increasingly aware of the physical and mental effects of drugs, legislatures must respond with stronger laws ensuring drug addicts stay out of prisons and stay in treatment centers where they can learn to become productive members of society. Furthermore, other states with ancient laws regarding drug sentencing must follow in Florida and New York's footsteps and create legislation which erases the signs of the failed War on Drugs. The future of mandatory minimums and strict downward departure guidelines look beautifully dim and the next decade promises to show more of the support drug addicted defendants require.